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SUPREME COURT OF THE UNITED STATES

October Term, 1958

LAMAR BATH HOUSE COMPANY, BUCKSTAFF BATH HOUSE COMPANY, OZARK BATH HOUSE COMPANY, QUAPAW BATH HOUSE COMPANY, MAURICE BATH COMPANY, SUPERIOR BATH HOUSE COMPANY, FORDYCE BATH HOUSE AND HALE BATH HOUSE ..... *Appellants*

v. No. 791

CITY OF HOT SPRINGS, ARKANSAS, HOT SPRINGS SEWER COMMITTEE, RAY S. SMITH, SR., THOMAS W. STONE, AND C. T. BATES, MEMBERS OF THE HOT SPRINGS SEWER COMMITTEE, AND ATTORNEY GENERAL OF THE STATE OF ARKANSAS ..... *Appellees*

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

JURISDICTIONAL STATEMENT

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CITY OF HOT SPRINGS, ARKANSAS, HOT SPRINGS SEWER COMMITTEE, RAY S. SMITH, SR., THOMAS W. STONE, AND C. T. BATES, MEMBERS OF THE HOT SPRINGS SEWER COMMITTEE, AND ATTORNEY GENERAL OF THE STATE OF ARKANSAS ..... *Appellees*

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

JURISDICTIONAL STATEMENT

This appeal is taken from the decree of the Supreme Court of Arkansas entered June 16, 1958, affirming in part and reversing in part a decree of the Chancery Court of Garland County, Arkansas, holding a State statute and two City ordinances valid and applicable in respect to Hot Springs National Park, without repugnance to Federal law, and appellants submit this jurisdictional statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINIONS BELOW

The decree of the Chancery Court, setting forth its grounds for decision, is not officially reported but is appended hereto at A-1. The opinion of the Supreme Court of Arkansas has not yet been officially reported but is appended hereto at A-6 and is reported in 315 S. W. (2d) 884.

JURISDICTION

1. This action was brought in the Chancery Court for an injunction against and declaratory judgment of invalidity and inapplicability of the State statute and two ordinances of the City of Hot Springs, Arkansas, at issue here. The proceeding was instituted pursuant to Vol. 3 Arkansas Statutes 1947 Annotated (Official Edition), Sections 22-404 and 34-2501 *et seq.* (Act 166 of 1903 and Act 274 of 1953 of Arkansas, as amended.)

2. The decree of the Supreme Court of Arkansas was entered on June 16, 1958 (T. 144) and is appended hereto at A-5. The order of the Supreme Court of Arkansas denying rehearing to appellants was entered on September 29, 1958 (T. 151). Notice of appeal to the Supreme Court of the United States was filed in the Supreme Court of Arkansas on December 27, 1958 (T. 152). On timely application, the time for docketing the appeal was enlarged to and including March 25, 1959 (T. 164).

3. The jurisdiction of this Court by appeal is conferred by 28 U. S. C. § 1257 (2) and by *certiorari* by 28 U. S. C. § 2103 and § 1257 (3).

4. Cases sustaining jurisdiction to review the decree below are: (a) *Pacific Coast Dairy, Inc.* v. *Department of Agriculture*, 318 U. S. 285; *Fort Leavenworth Railroad Company* v. *Lowe*, 114 U. S. 525; *Surplus Trading Company* v. *Cook*, 281 U. S. 647; *Utah Power & Light Company* v. *United States*, 243 U. S. 389; *United States* v. *County of Allegheny*, 322 U. S. 174; (b) *Hoeper* v. *Tax Commission of Wisconsin*, 284 U. S. 206; *Myles Salt Company* v. *Board of Commissioners of Iberia & St. Mary Drainage District*, 239 U. S. 478; *Senior* v. *Braden*, 295 U. S. 422; (c) *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389; *Hartford Steam Boiler Inspection & Insur-*

ance Company v. *Harrison*, 301 U. S. 459; (d) *Appleby* v. *New York*, 271 U. S. 364; *John P. King Manufacturing Co.* v. *City Council of Augusta*, 277 U. S. 100.

5. The validity of the following statute of the State of Arkansas and ordinances of the City of Hot Springs, Arkansas, enacted pursuant to the statute, is involved: Act 132 of the General Assembly of Arkansas of the year 1933 (Vol. 2 Arkansas Statutes 1947 Annotated, Official Ed., § 19-4101 through 19-4122), and Ordinances 2444 and 2449 of the City of Hot Springs, Arkansas. Their pertinent text is set forth in Appendix B, beginning, respectively, at pages A-20, A-16, and A-18. The pertinent text of the following Federal statutes, constitutional provisions, and agreement (entered into by the Department of the Interior, National Park Service) relating to Hot Springs National Park,[1] and the statute of the State of Arkansas ceding to the United States exclusive jurisdiction over the portion of the Park involved here, is also set forth in that Appendix, beginning at the page shown below for each:

(a). Acts of Congress: Act of December 16, 1878, c. 5, 20 Stat. 258, as amended, particularly by Act of April 12, 1904, c. 1249, 33 Stat. 173; 16 U. S. C. § 361 (A-29); Act of March 3, 1891, c. 533, 26 Stat. 842 *et seq.*, 16 U. S. C. §§ 362, 363 (A-30); Act of April 20, 1904, c. 1400, 33 Stat. 187, 16 U. S. C. § 372 (A-29);

(b). Cession by Arkansas to the United States: Act 30 of the year 1903, adopted February 21, 1903, Vol. 2 Arkansas Statutes 1947 Annotated (Official Ed.) § 10-1123 (A-28);

(c). Agreement of National Park Service and City of Hot Springs (A-26);

(d). Constitution of the United States: Article 1, Section 8, clause 17 (A-32); Article 4, Section 3, clause 2 (A-32); Article 6, clause 2 (A-32); Article 1, Section 10 (A-32); and Amendment 14, Section 1 (A-32).

QUESTIONS PRESENTED

The State and City sewer laws in issue have been applied here to impose the sewer charges in issue upon Ap-

[1] The area referred to in many statutes as the "reservation" is now known as Hot Springs National Park, by Act of Mar. 4, 1921, c. 161, 41 Stat. 1407. It will be called the "Park" herein.

pellants (lessees of Federally owned bath house premises of Hot Springs National Park) for sewage discharge of the Park, and have been held valid, as applied, by the Supreme Court of Arkansas in connection with which the following questions are presented:

1. Whether the local laws, as applied, unlawfully conflict with and violate: (a) the exclusive and paramount Federal authority and jurisdiction over this Park, over Appellants and over the subject matter of the local laws, as here applied, under Article 1, § 8, clause 17 and Article 4, § 3, clause 2 of the Federal Constitution, under applicable implementing Federal legislation, policy and practice governing the Park and subject matter of the local laws, and (b) Federal immunity, as to property and functions, from such impositions under that Constitution;

2. (a) If the charges can be imposed at all in respect to Park sewage, whether the local laws are applied here arbitrarily and unlawfully in imposing the charges in issue as a personal liability of Appellants, in violation of the due process clause of Section 1 of the 14th Amendment to the Federal Constitution, where the charges constitute charges against land, the "fee title," and are for sewage discharge of the Park attributable to the United States, rather than these lessees, respecting which the United States has sole responsibility, obligation, control and authority; and (b) is due process violated by the imposition outside the jurisdiction of the City and within that of another government;

3. If the charges can be imposed at all in respect to Park sewage discharge, whether the local laws, as applied here, effect an unconstitutional discrimination against Appellants, violating the equal protection clause of Section 1 of the 14th Amendment to the Federal Constitution, arbitrarily and unlawfully singling out and imposing the charges on Appellants while not imposing them on the other persons and institutions in like circumstances respecting Park sewage discharge and the subject matter and application of the local laws, and rather than imposing them on the land and owner, the United States, on which rests sole authority, responsibility, control and obligation respecting the Park sewage and the subject matter;

4. Whether the local laws, as applied to impose the sewer charges here, unlawfully abrogate a contract between the Federal Government and the City of Hot Springs, Arkansas, precluding the impositions, in violation of Article 1, § 10, Clause 1 of the Federal Constitution prohibiting impairment of contract obligations.

STATEMENT

In the year 1818, the United States acquired the property of Hot Springs National Park,[2] formerly known as the "Reservation," geographically situated in what is now Garland County, Arkansas. Congress subsequently enacted various statutes governing the area, reserving the land and hot springs for future disposal of Congress, forbidding entry, location and appropriation for any other purpose,[3] for example, and providing for granting leases of bath houses situated on the Park for "the public service" of hot water baths.[4] In 1903, the State of Arkansas ceded "exclusive jurisdiction" over the Park to the United States;[5] and in 1904, Congress accepted the cession and assumed "sole and exclusive jurisdiction"[6] over it. The Park and the City of Hot Springs, Arkansas, are situated adjacent to each other.

Appellants (one partnership, one individual and six corporations) are the eight operators of the eight public bath houses owned by the United States on the Park, occupying the premises under 20-year leases granted by the United States, Department of the Interior (T. 53-54, R. 63 *et seq.*).[7] The leases, of which Stipulated Exhibits 1 and 2 are typical,[8] were granted pursuant to federal statutes governing the Park, e. g. 26 Stat. 842, 16 U. S. C. §§ 362, 363, and 39 Stat. 535, 16 U. S. C. § 3. (Stip. ex.

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[2] See Hot Springs Cases, 92 U. S. 698.

[3] Act Apr. 20, 1832, 4 Stat. 505.

[4] Act Dec. 16, 1878, 20 Stat. 258; 16 U.S.C. § 361; Act Mar. 3, 1891, 26 Stat. 842, 16 U.S.C. § 362, 363.

[5] Act of Ark. Feb. 21, 1903, Act 30, 2 Ark. Stats. 1957 Annotated, § 10-1123.

[6] Act Apr. 20, 1904, 33 Stat. 187, 16 U.S.C. § 372.

[7] Reference to pages of certified transcript will be preceded by "T". and reference to the pages of the record as printed below will be preceded by "R."

[8] All stipulated exhibits are attached to transcript in a separate envelope. They were put in evidence by stipulations at T. 53 *et seq.* R. 49 *et seq.* and T. 64 R. 104.

1, p. 1), "for the purpose of providing bathing facilities for the public." (Stip. ex. 1, p. 1). The appellees, called the "City" in this statement, are the City of Hot Springs, Arkansas, its Sewer Committee and Members thereof. The Attorney General of Arkansas is a nominal party merely, (by 3 Ark. Stats. § 34-2510), having taken no part in the proceedings.

The City has applied its regulatory sewer ordinances and sewer charges provided therein, exercising its "police powers" (T. 135, A-6 *et seq. infra*), to the national Park and the portion of the sewage discharge of the Park which the City attributes to appellants, as their personal liability and responsibility, although the Federal Government discharges all sewage from all parts of the Park into its own sewer main located on the Park (T. 88, R. 117). This appeal is concerned in part with the regulatory, legislative power of the Federal Government and of the City, respectively, over the Park and disposal of sewage of the Park, which is owned and operated by the United States and is under its "sole and exclusive" legislative and territorial jurisdiction and sovereignty (T. 54, R. 51), and in part with the effects of arrangements made by agreement between the Federal Government and the City in the 1930's for disposal of sewage from both the federal area and the municipal area.

With respect to sewage disposal of the Park, the Federal Government, through the National Park Service, in the administration of the Park, has always had the policy, responsibility and obligation to provide for sewage disposal for the entire Park. (Stip. ex. 11, p. 30-32, 34-35, 39, R. 90-96).[9] The Federal Government pays the "total costs" for all sewage sources on the Park, including that of appellants (Id. p. 32, R. 91). "The sewage from the bath houses is a part of the Government sewage" (Id. p. 35, R. 93). "Every bit of sewage that arises on the Hot Springs Reservation, or Hot Springs National Park, whichever term you want to use, is a United States Government obligation to dispose of. This agreement was entered into in order to carry on and fulfill our obligation.

[9] Stip. ex. 11 is the record in previous litigation between the City and appellants, and the exhibit is stipulated in the present proceeding at T. 61 to constitute a part of the record here for all purposes.

It includes bath houses, among other things" (Id. p. 39, R. 95-96).

With respect to sewage disposal of the municipality, the City has this responsibility, to be fulfilled by exercise of its local "police powers." (Opinion below T. 135, appended hereto at A-6).

Prior to 1935, the Federal Government and the City used separate sewer facilities for their respective jurisdictions, the Federal Government's system for the Park consisting of lines leading to a sewer main built and owned by the Federal Government on the Park, carrying Park sewage away and discharging it into a creek (T. 87-88, R. 116-117, Stip. ex. 11, p. 31-32 R. 91, T. 94, R. 120).

In 1933 the two Governments, Federal and City, agreed to carry out a sewage disposal arrangement whereby sewer mains of each would be connected and used by both, though without transfer of ownership, and whereby new sewage disposal plants would be constructed, to be owned by the City but to be built by contributions from both Governments, the National Park Service contributing approximately $82,000.00, the City providing approximately $175,000.00 and other sources, e. q. Federal P. W. A., taking some part (T. 61, R. 61, St. ex. 11, p. 22, R. 85). Sewage from both the Park and the municipal area was to be carried to and treated at the new plants. The change, respecting Park sewage disposal brought about by the arrangement, was that the Park sewage, instead of being discharged into the creek, was picked up by the City at the end of the federal sewer main and carried by a City main out to one of the new disposal plants along with the City's own sewage from a part of the municipality which the Park Service permitted the City to drain through the federal sewer main on the Park, which main was already receiving all Park sewage and carrying it away as one discharge (Stip. ex. 11, p. 31-32, R. 91, T. 87-88, R. 116-117, T. 112, R. 130). A written agreement (appended hereto at A-26, T. 39, R. 38), signed by Federal and City authorities in 1935 on the subject, included the following terms:

> "That the Government be not charged for any service or use of the system at any time in the future.

"That the cost of all repairs, alterations, maintenance and operation of the system be borne by other than United States Government sources."

To provide its share of the funds for building the disposal plants in 1935, the City levied a sewer tax *ad valorem* on property, by ordinance. (Stip. ex. 11, p. 10, R. 83). It attempted to impose the tax ordinance upon appellants, who sued in the Chancery Court of Garland County, Arkansas, in the year 1935, to enjoin the City from enforcing it against them, alleging the exclusive jurisdiction of the United States over the Park and that the agreement between the National Park Service and the City prohibited the levy against them. (Stip. ex. 11, p. 1 *et seq.* R. 80 *et seq.*). In that previous suit, the City urged that appellants were not exempt by reason of their location on the Park and that the agreement did not cover them. (Id., p. 18-C, 19, R. 84). After full trial, in 1945, the court found "all issues" in favor of appellants and enforced the agreement between the two governments, holding that appellants were "United States Government sources" within the meaning of the agreement and could not be charged, enjoining the City from imposing the sewer tax ordinance upon them. (Id. p. 52, R. 103, appended hereto at A-13). The City did not appeal (T. 61, R. 62).

In 1953, the City found it necessary to enlarge and rehabilitate the disposal plants originally built in 1935 by contributions from both governments. The plants were overloaded and the work was found necessary "to give adequate service to the inhabitants of the City." (Ord. 2449, A-18, *infra*). The ordinances in issue here, No. 2444 and 2449, appended at A-16, A-18, were then enacted. The old sewer tax, which the Chancery Court, in the previous suit, had held not applicable to Park sewage sources is no longer levied by the City at all.

As in the instance of the old sewer tax ordinance, the City attempted to impose the new ordinances in issue here on account of sewage discharge from the Park which the City attributes to appellants.

The new ordinances and state statute in issue provide comprehensive regulatory powers to cities on the entire

subject of sewage disposal, the statute (A-20, *infra*) directing that sewer charges are to be paid by "each landowner" whose property is connected, (§ 19-4113), and that "it is the intention of this Act that a landowner shall be liable for such service charge, even though the use of the service system is by his tenant or lessee; . . . on such lands all charges, if not paid when due, shall constitute a lien upon the premises . . .; said charge to constitute a lien upon the fee title to the land and permanent improvements, even though the occupant receiving the benefit of the service for which the rent or charge is due has merely a leasehold interest (or other lesser estate) in the premises." (§ 19-4113). Cities are given power to foreclose the liens in Chancery Court where the sewer system is located, power of eminent domain, jurisdiction for 10 miles outside their corporate limits for all purposes of the statute, the granted powers being cumulative to all other city powers. (§§ 19-4113, 19-4105, 19-4120). A sewer charge is levied based on volume of discharge into the sewer system, by Ordinance 2444, which also provides a lien upon land for the charge, "even though" use of the system is by a tenant or lessee. (A-16, *infra*).

Ordinance 2449 (A-18, *infra*) makes it a misdemeanor for any owner to fail or refuse to connect his property with the city sewer system, (§ 14), directs all owners of property to connect to the system, (§ 13), provides that the sewer charges are for work done at the disposal plants and for operation and maintenance of the city sewer system (§ 3, 6) and that "charges shall constitute a lien upon the fee title to the land and permanent improvements, even though the occupant receiving benefit of the service has merely a leasehold interest, or other lesser estate in the premises." (§ 12).

Appellants brought this action to enjoin enforcement of the local laws and to have them declared invalid, as applied here.

Appellants have never paid anything to the City for sewer purposes. They pay rental, called "franchise fee" or "water rent," to the Federal Government pursuant to Federal statutes (e. q. Act Mar. 3, 1891, 26 Stat. 842) and their leases, covering their occupancy and operations.

Their rental is calculated on the basis of volume of hot mineral water used in operating the bath houses plus a fixed amount per tub for public bathing purposes, authorized by the Park service. (e. g., Stip. ex. 1, p. 5 and Stip. ex. 2, p. 2 of contract amendment of year 1951 attached to lease contract).

The Federal Government is sole owner of the land and permanent improvements occupied by appellants under their leases; (T. 54, R. 51 *et. seq.*, Stip. ex. 1 and 2, R. 63 *et seq.*) the sewer charges in issue "constitute" a lien on the land, under the terms of both State statute and City ordinances, as shown above; and the Federal Government has sole and exclusive legislative and territorial jurisdiction over the Park (T. 54, R. 51), and has affirmatively assumed sole responsibility and obligation for sewage disposal of the entire Park. (Stip. ex. 11, p. 30-32, 34-35, 39, R. 90-96).

The City has not sought to impose the ordinances and sewer charges on any other occupants of the Park or for any other part of the sewage discharge on the Park except that from the portion occupied by appellants, other occupied sources on the Park being the Federal Hospital, National Park Service offices, Comfort Stations and dwellings; when the ordinances were first enacted in 1953, the occupant of one dwelling was billed for one month, but on notification to the City that the dwelling was located on the Park the City cancelled the sewer charge and has not attempted to impose it on that occupant or any other occupant of the Park except these appellants since that time (T. 60, R. 59-60).

The combined sewer use arrangement between the Federal Government and the City, which commenced in 1935, is still continuing in fact in all respects except as to the attempt made in this proceeding by the City to enforce its laws and charges against Appellants; the City is still using the federal main for drainage of one end of the City (T. 88-90, 98, R. 117 *et seq.*, 122); the facilities built by funds of both governments in 1935, which are still in use at the plants, are today worth approximately $400,000.00 (T. 122, R. 136). The new work done at the plants in and since 1953 in extensively enlarging and rehabilitat-

ing them amounted to some $663,000.00 plus engineering fees and incidentals (T. 128-129, R. 141).

There is apparently no issue remaining over the meaning of the agreement which was made by the Park service and the City in that covers by its terms all occupants and sources of sewage on the Park including appellants and by its terms would prevent imposition of the charges in issue here (T. 66, R. 106).

No consent of Congress or any other Federal authority has been suggested in the proceeding for application of the local laws in issue against the Park, the sewage discharge in issue or any occupant of the Park.

By far the major part of the sewer discharge of the Park attributed to appellants here is made up of hot mineral water from the Park springs used for the public bathing purpose, a small portion being made up of the fresh water purchased from the City water supply system. (Stip. ex. 10, T. 59, R. 59, 78-79). Calculated on fresh water discharge only, in an illustrative 12-month period, (October, 1954-September, 1955), the sewer charges would amount to $965.40, whereas calculation based on both city water and hot mineral water from the Government springs for that period would amount to $7,002.00. (Stip. ex. 10, R. 79).

HOW THE FEDERAL QUESTIONS ARE PRESENTED

The Federal issues presented were raised at the inception of the proceeding (Complaint, T. 1, R. 19), and decided in the decree of the Chancery Court, (T. 66, R. 105), which, e. g., expressly cites Article 1, Section 8, Clause 17 of the Federal Constitution, incorporates into the decree all Federal constitutional and statutory law cited in the complaint and expressly confirms the important stipulation at T. 53, R. 49. All issues were carried forward to the Supreme Court of Arkansas by the direct appeal taken there by appellants, on the entire record (T. 69-71, 78; R. 110-112), and by the cross-appeal of the City from the portion of the Chancellor's decree holding the ordinances not applicable to hot mineral water originating from the Park springs (T. 81, R. 112). They were decided by the decree

of the Supreme Court of Arkansas by its express affirmance, on the entire transcript, of the trial court decree on the direct appeal and by its reversing the trial court in respect to the hot mineral waters (T. 144). They were again presented in the petition for rehearing, which was denied (T. 145-151).

The Chancery Court decree held that with respect to fresh water obtained and originating from the City water supply system the ordinances and statute, as applied here, were valid and not repugnant to the Federal Constitution, laws and authority in issue, and that appellants and the sewage discharge on and from the Park, attributed to them, were not immune from their application, but that the ordinances did not apply to the hot mineral water originating from the Government springs on the Park.

The Supreme Court of Arkansas, one Justice dissenting (T. 144), affirmed the Chancery Court decree in all respects as to the fresh water discharge, on appellants' direct appeal, and extended the rulings in the Chancellor's decree to subject the hot mineral water from the Government springs to the ordinances and statute, reversing the Chancellor's decree on the City's cross-appeal, holding that the State statute and ordinances were valid as applied to exact charges from Appellants for Park sewer discharge attributed to them, both of fresh and hot mineral water, that they were not repugnant to the Federal statutes or Constitution, and that no immunity from their application existed. Mr. Justice McFaddin dissented.

In the opinion, the Court below, at T. 137, referred to the issues by listing the headings under which they had been argued in appellants' brief there (e. g., the issue of lack of legislative and territorial jurisdiction of the City and of the trial court to enforce the sewer legislation here, the issue of unconstitutional impairment of contract, etc.) and then devoted itself to the City's contention that the agreement between the Federal Government and the City was *ultra vires* of the municipality in purporting to bind itself not to exercise its "legislative and governmental functions" by means of its police powers, in the form of the new sewer ordinances 2444 and 2449 and to apply the ordinances and their charges to the sewage discharge attrib-

uted to appellants when the needs of the City for improvement of its sewer system arose, for the health and well-being of its inhabitants. At T. 141, the Arkansas court rejected the grounds urged by appellants with the statement that they did not constitute "valid" reasons why the sewer charges should not be imposed upon them.

THE QUESTIONS ARE SUBSTANTIAL

The Federal Government carries out its operation of the Park in large part by means of the lease or concession contracts with Appellants and controls all phases of their activities by rules and the lease provisions, treating and regarding them for this purpose as a "government activity." (Stip. ex. 11, p. 35, R. 93; and Stip. ex. 1, 2, 3 and 4, R. 63, 68, 70, 71).

By the ordinances in issue, enacted in 1953, the City has unlawfully converted one of their claimed effects, nullification of the express prohibition of the Federal Government against the City's levying sewer charges on Park sources of sewage, into affirmative legislative, regulatory power over the Park and the subject of its sewage disposal, contrary to Article 1, Section 8, Clause 17 and Article 4, Section 3, Clause 2 of the Federal Constitution. Even if the agreement, containing the express prohibition, (appended at A-26), had never been made between the Federal and City authorities, the new ordinances as applied here would be nullities, wholly without effect, where the Park is, by the supreme law of the land, Federal Constitution and statutes, under "sole and exclusive jurisdiction" of the United States and where "all needful rules and regulations" respecting it are to be made by the Federal Government, which has affirmatively retained control and responsibility of all Park sewage in itself (Stip. ex. 11, p. 35-39, R. 93-96). The decree below is in direct conflict with law which has always governed such areas as this Park and their administration and with the following decisions of this Court which establish that no form or variety of local legislation can constitutionally have any operative effect respecting such areas and their operation and which also sustain the jurisdiction of this Court to review the decision to the contrary: *Fort Leavenworth Railroad Company* v.

Lowe, 114 U. S. 525 (taxation); *Pacific Coast Dairy, Inc.* v. *Department of Agriculture of California*, 318 U. S. 285 (milk control measures); *Surplus Trading Company* v. *Cook*, 281 U. S. 647 (taxation); *Western Union Telegraph Company* v. *Chiles*, 214 U. S. 274 (civil penalties); *Benson* v. *United States*, 146 U. S. 325 (crimes); *Arlington Hotel Company* v. *Fant*, 278 U. S. 439 (civil liability); and *United States* v. *County of Allegheny*, 322 U. S. 174 (taxation).

Even if appellants, rather than the United States, were the owners of the property in the Park respecting which the sewer charges "constitute" a charge and lien "against the fee title" (2 Ark. Stats. § 19-4113, A-23 *infra*) the charge would be unlawful. *Surplus Trading Company* v. *Cook, supra.*

The *Fant* case, *supra*, involving this Park, held even a state statute governing mere civil liability for damages between a hotel and its guest to be wholly without effect, even when the subject had never been acted upon by Federal authority, either by statute, policy or practice. In its opinion, 278 U. S. 439, at 455, this Court said:

> ". . . It was certainly a wise prevision which with the consent of the State brought within exclusive national jurisdiction the hospital buildings and accessories and all the forty-four springs from which the healing waters came, in order to secure to the government their complete police protection, preservation and control. This justified acquisition of the springs and hospital for the exclusive jurisdiction of the United States under clause 17, section 8, article 1 of the Constitution. Nor is the constitutional basis for acquisition any less effective because the springs thus kept safely available for the Federal purpose do in the abundance of their flow also supply water sufficient to furnish aid to the indigent and to those of the public of the United States who are able to pay for hotel accommodation on the little park surrounding the hospital and the springs. *Benson* v. *United States*, 146 U. S. 325, 36 L. ed. 991, 13 Sup. Ct. Rep. 60 and *Williams* v. *Arlington Hotel Co.* (C. C. A. 8th) 22 F. (2d) 669."

All forms of state legislation are excluded from operation here, in the absence of consent of Congress, as in the in-

stance of the District of Columbia itself. In the *Lowe* case, *supra*, 114 U. S. 525, at 532, 537, frequently called the leading case on exclusiveness of federal power over such areas, the applicable principle is thus stated:

> "When the title is acquired by purchase by consent of the legislatures of the states, the federal jurisdiction is exclusive of all state authority. This follows from the declaration of the Constitution that Congress shall have 'like authority' over such places as it has over the district which is the seat of government; that is, the power of 'exclusive legislation in all cases whatsoever.' Broader or clearer language could not be used to exclude all other authority than that of Congress."
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> "These authorities are sufficient to support the proposition which follows naturally from the language of the Constitution, that no other legislative power than that of Congress can be exercised over lands within a state purchased by the United States with her consent for one of the purposes designated; and that such consent, under the Constitution, operates to exclude all other legislative authority."

The decree below conflicts with a recent decision by the same Arkansas Court involving the Park, *Ladwig* v. *Nance*, 223 Ark. 559, holding the City to be without governmental power to regulate or legislate upon the subject of the work of appellants' employees in the operation of their bath houses and that only the Secretary of the Interior can make "needful rules and regulations regarding the operation of bath houses in the Hot Springs National Park." No consent of Congress has been given here, in contrast to the circumstances in *Buckstaff Bath House Company* v. *McKinley*, 308 U. S. 358, and we believe that the ordinances in issue are in conflict with appended Federal statutes involved, 20 Stat. 258, 33 Stat. 173, 26 Stat. 842, *et seq.*, 33 Stat. 187, 16 U. S. C. §§ 361-363, 372, providing for Federal regulation only, with Federal policy and practice in administering this Park, which has kept in Federal power and control the whole subject of Park sewage disposal, retaining sole responsibility and obligation on the subject (Stip. ex. 11, p. 35, 39 R. 93, 95-96), and fixing the

water rent paid to the Federal Government by Appellants under their leases to cover all operations and privileges of occupancy, including sewage disposal (Id. and Stip. ex. 1 and 2, R. 63 *et seq.*, 68 *et seq.*). Federal policy and authority was recently confirmed or extended, as to all utilities and all properties in the National Park System: Act of August 8, 1953, c. 384, 67 Stat. 495.

The local laws in issue make mandatory requirements of property owners, impose civil and criminal penalties for failure to comply and the charges explicitly "constitute" a lien upon the fee title to land and permanent improvements, the ownership of which is in the United States. They unlawfully emasculate Federal power over the territory and subject matter. "As respects such Federal territory, Congress has the combined powers of a general and a state government." *Pacific Coast Dairy, Inc.* v. *Department of Agriculture of California*, 318 U. S. 385. If the ordinances apply as to the Park and its sewage discharge, as they are held to do by the decree below, apparently they would prevent the Federal Government from determining that it would use or provide its own separate sewer facilities again for sewage disposal of the Park, or, at least, would appear to subject occupants of the Park or Federal officials who made the determination to civil or criminal penalties. Long range plans for administering the Park and long term leases, fixing water rent, cannot be entered into with certainty of fulfillment, if the decree below stands, because it is the City Council, rather than the Federal Government, which would determine, at its will, sewer charges and regulations for the Park, creating liens and emasculating the federal power to fix reasonable water rents on a long term basis, contemplating that the rents cover all privileges, including sewage disposal, as a government responsibility (Stip. Ex. 11, P. 32, 35, R. 91, 93). The Federal property and its use, regulation and operation are unlawfully placed under state regulation and control, at the mercy of state and city legislation. *Utah Power & Light Company* v. *United States*, 243 U. S. 389; *Hunt* v. *United States*, 278 U. S. 96; *McElvey* v. *United States*, 260 U. S. 353.

The public importance of the issues is manifest. If requirements, charges and liabilities on any subject are to be

created respecting the Park, it is Congress, and not the city or state, which has power to make them, as stated in *Western Union Telegraph Company* v. *Chiles*, 214 U. S. 274 at 278-279:

> "It is of the highest public importance that the jurisdiction of the state should be resisted at the borders of those places where the power of exclusive legislation is vested in the Congress by the Constitution . . . If it is desirable that penalties should be inflicted for a default in the delivery of a telegram occurring within the jurisdiction of the United States, Congress only has the power to establish them."

The charges here are "charges against the real estate," the "fee title to the land and permanent improvements," *in rem*, both by unambiguous terms of statute and ordinances, (e. g. 2 Ark. Stats. § 19-4113 *infra* at A-23, Ord. 2444, at A-17, and Ord. 2449, at A-19), and by holding of the Supreme Court of Arkansas, *Jernigan* v. *Harris*, 187 Ark. 705. The United States is the owner here (T. 54, R. 51); the sewage disposal of the Park is its function and responsibility; and the charges contravene the constitutional immunity of Federal property and functions from such charges, even though collection here is sought from Appellants: *M'Culloch* v. *Maryland*, 4 Wheat. (U. S.) 316; *Van Brocklin* v. *Tennessee* (*Van Brocklin* v. *Anderson*) 117 U. S. 151; *Kern-Limerick* v. *Scurlock*, 347 U. S. 110; *United States* v. *County of Allegheny*, 322 U. S. 174.

2. In Allegheny, *supra*, it is suggested that jurisdiction of this Court, where enforcement of a state levy on property is sought, *in personam*, against one not the owner, or against private persons because the Federal Government, the owner, is immune, could have been based on a claim unlawful deprivation of due process of law under Section 1 of the 14th Amendment to the Federal Constitution. Here the charge is on the "fee title" to the land and permanent improvements (2 Ark. Stats. § 19-4113), the foundation, theory and purpose of the particular charges here being permanent benefit to the land served by a sewer system and ownership of the land. *Jernigan* v. *Harris*, 187 Ark. 705. And the subject of the charge and basis of

its measure here is sewage discharge of the National Park. Enforcement as a personal liability of appellants is arbitrary and discriminatory, an unconstitutional violation of due process, as is attributing to Appellants the sewage discharge itself and the benefits arising from the sewer system, when the Federal Government has in fact always had the discharge of the entire Park as solely its discharge, obligation and responsibility, no part of which the City can, contrary to the fact of Federal policy, practice, control and responsibility, reasonably allocate and attribute to Appellants. (Stip. ex. 11, p. 30-35, 39, R. 90-96). The imposition here is analogous to imposing and measuring a property tax or income tax on one person where the property or income in fact belongs or is solely attributable to another person, an arbitrary and discriminatory act violative of due process, *Hoeper* v. *Tax Commission of Wisconsin*, 284 U. S. 206, or assessing land of one person for benefits allocatable and attributable only to lands of others. *Myles Salt Company* v. *Board of Commissioners of Iberia & St. Mary Drainage District*, 239 U. S. 478. It is unconstitutionally arbitrary here for the added reason that the Federal jurisdiction over the Park is complete, separate from that of the City and state, as in the instance of two adjacent states; where the jurisdiction of one ends that of the other begins. Here Appellants are subject to regulation and charges by the government of the area in which they operate, for sewage disposal and all other benefits, in the form Congress chose to provide by statute, water rents (26 Stat. 842 *et seq.*, 16 U. S. C. §§ 362, 363). It should be as "impossible" here without violating due process, for the City to lay the charge outside the borders of its jurisdiction and within the borders of the jurisdiction of another government both as to territory and subject matter, as this Court holds it to be in instances where one state lays a tax on property located in another state. *United States* v. *Bennett*, 232 U. S. 299; *Wheeling Steel Corporation* v. *Fox*, 298 U. S. 193; *Senior* v. *Braden*, 295 U. S. 422. The decree below held that the ordinances and their charges, so applied and enforced, did not conflict with the due process clause, and the decisions above sustain the jurisdiction of this Court to review the decree's conclusion on that question.

3. The enforcement against these eight tenants of the Park, is unreasonably discriminatory both in placing burdens on tenants which can reasonably be placed, if at all, only on the owner of the land who is also the actual user of the sewer system under express federal policy, and in arbitrarily and deliberately singling out these eight Appellants (one partnership, six corporations and one individual, T. 53, R. 49) for the impositions among all of the individuals and institutions occupying and operating premises on the Park in like circumstances with respect to sewage discharge (T. 60, R. 59). The incident which occurred respecting the one instance when a charge was imposed on another individual occupant but quickly cancelled when the City was informed that the premises he occupied were located on the Park, pointedly emphasizes the existence and degree of arbitrary discrimination against Appellants (T. 60, R. 59-60). No other attempt is being made or has been made since enactment of the ordinances in 1953 to impose the ordinances and charges on any other occupant of the Park, though the sewage discharge of all goes into the same federal main, carried away as one discharge to the same disposal plant. The City has remained silent on the subject of discrimination; there is no explanation in the record for it, and we believe no reasonable basis for the discrimination can be conceived. There is no difference between appellants and all other individuals and institutions on the Park having any material or substantial relation to the subject matter and purposes of the ordinances, and arbitrarily charging Appellants for benefits which the City itself claims accrue to all, while excepting from charges all others in like circumstances, is unconstitutional discrimination, denial of equal protection of the laws in violation of Section 1 of the 14th Amendment to the Federal Constitution. *Morey* v. *Doud*, 354 U. S. 457; *Hartford Steam Boiler Inspection & Insurance Company* v. *Harrison*, 301 U. S. 459; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389. Those decisions also sustain this Court's jurisdiction of the appeal; Appellants invoked the clause in resisting the local laws, in the event the ordinances could be applied at all to Park sewage sources (T. 7, 8, R. 28, 29), and the decision below sustained their validity as applied.

4. The effect of the local legislation in overriding the long range agreement (appended at A-26) for combined use of sewer facilities by the Federal Government for its area and by the City unlawfully impairs the obligation of the agreement, which forbids the very charges in issue, contrary to Article 1, Section 10 of the Federal Constitution. The agreement is one by which the Federal Government exercised its constitutional functions in administering the Park, and its validity, construction and effects are questions controlled by Federal law, on which the state is not the final judge. In *United States* v. *County of Allegheny*, 322 U. S. 174, at 183, this Court said:

> "The validity and construction of contracts through which the United States is exercising its constitutional functions, the consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state." (Citing applicable cases.)

Even apart from Federal law prohibiting the City from applying its laws to the Park with or without the additional force of the agreement, Appellants have reasonably claimed that the agreement is enforceable and may not, consistently with the Federal Constitution, be impaired by the local laws (T. 6, R. 25). This Court has jurisdiction to review the decree below holding that the agreement was not unlawfully impaired by the impositions and that the City had no power to make the agreement. (See T. 67-68, R. 107, T. 144, 138). *Appleby* v. *New York*, 271 U. S. 364; *John P. King Manufacturing Co.* v. *City Council of Augusta*, 277 U. S. 100, at 114-115. Contracts between the United States and a state cannot constitutionally be impaired, *McGehee* v. *Mathis*, 71 U. S. 143; and the rule that this Court, when the Federal claim is made, must ultimately determine the existence and validity of a contract and whether it is impaired is one of necessity, as stated in *Delmas* v. *Merchants' Mutual Insurance Company*, 81 U. S. 661:

> "Besides, this Court has always jealously asserted the right, when the question before it was the impairing of the obligation of a contract by state legisla-

tion, to ascertain for itself whether there was a contract to be impaired. If it were not so, the constitutional provision could always be evaded by the state courts giving such construction to the contract, or such decisions concerning its validity, as to render the power of this court of no avail in upholding it against unconstitutional state legislation."

We respectfully submit that the analysis made by the Court below of the Federal-City agreement read into it effects which are not there (A-5, A-26). It is not "perpetual" in purport; it merely had no time limit because neither jurisdiction is bound to use the sewer system for any length of time; also such physical facilities have a long life, which cannot be precisely fixed, and the time of operation of the agreement was necessarily indefinite by reason of the subject matter. The City was not bound to operate the system for any period of time or to make any repair or alteration except by its own unilateral determination, and the Federal Government can only request betterment of maintenance and operation, not enforce it. The same agreement had been held valid and enforced in previous litigation between the same parties in which that question was determined by final judicial decision (T. 45, Stip. ex. 11, at p. 53, R. 103, appended at A-13).[10] See *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U. S. 320. The United States and Appellants entered into their current long-term leases, and fixed the rental on the reasonable assumption that City charges were not leviable on Park sewage. Until the decree below was rendered, long range sewer system contracts, between City and the Federal Government, of indefinite duration, embodying terms required by the Federal Government for it to be willing to cooperate and participate, were held valid by the Supreme Court of Arkansas. *Atkinson* v. *Pine Bluff*, 190 Ark. 65, and municipal contracts, made under general powers (e. g. 2 Ark. Stats. 1947 Anno., §§ 19-2313, 19-2301), were enforceable in the ab-

[10] If the rule stated in *Gelpcke* v. *City of Dubuque*, 68 U. S. 175, is to be applied rarely, still the circumstances here ought to warrant its application: "'The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision if its courts altering the construction of the law.' *Ohio Life & Trust Co.* v. *Debolt*, 16 How., 432."

sence of fraud and bad faith or arbitrary action. *Johnson* v. *Russell, Mayor*, 198 Ark. 49. The Ohio decision applied by the Arkansas Supreme Court, in its opinion below, to the Federal-City agreement here, *State ex rel. Gordon* v. *Taylor*, 149 Ohio St. 427, 79 N. E. 2d 127, has no application. In that case, the area involved was within the regulatory, legislative power of the City, in contrast to the circumstances here, and other distinctions have been noted by the New Jersey Court in *Borough of Milltown* v. *City of New Brunswick*, 3 N. J. Super. 113, 65 A. 2d 621, which rejected the Ohio decision.[11] And, in all events, the present action involves a long range agreement entered into by the Federal Government as a long range solution of an important aspect of its administration of a national park, pursuant to Federal statutes, and the validity and effects are for this Court to determine ultimately, both because of its subject matter and parties and because Appellants assert that the ordinances in issue have unlawfully impaired a valid agreement. *United States* v. *County of Allegheny, supra; Municipal Investors Association* v. *City of Birmingham*, 316 U. S. 153, at 157. The City has appropriated the benefits for over 20 years and continues to do so daily; it is still operating by the agreement except for rejecting the burdens of the agreement on the first occasion on which the burdens substantially affected it (without any suggestion in the record that it would suffer any financial or other distress in abiding by the agreement fully), the first and only major repair and alteration made since the Federal Government and City built the plants in 1935 (T. 57, R. 56). Whether a city can obtain such benefit as it has received here from the Federal Government by agreement and then nullify the burdens, at will, as to aspects of it which have become distasteful to the City, while continuing to appropriate the benefits, should be determined by this Court.

It is submitted that the local laws as applied conflict with the Constitution and laws of the United States and

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[11] Ohio itself upholds and enforces such agreements where two governmental jurisdictions make them, even two municipalities, *City of Cleveland* v. *Village of Cuyohoga Heights*, 81 Ohio App. 191, 75 N.E. 2d 99, as do all other decisions under circumstances which we believe analogous to those here, without any exception we have found: e.g. *City of Des Moines* v. *City of West Des Moines*, 239 Iowa 1, 30 N.W. 2d 500.

that the issues are so substantial and important as to require plenary consideration, with briefs and oral arguments, for their resolution.

Respectfully submitted,

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APPENDIX A

Decrees and Opinions Below

1. Decree of trial court.

(T. 66, R. 105)

IN THE GARLAND CHANCERY COURT

LAMAR BATH HOUSE COMPANY, ET AL. ..... *Plaintiffs*

v. Docket No. 29535

CITY OF HOT SPRINGS, ARKANSAS, ET AL. ..... *Defendants*

DECREE

On this 21st day of May, 1957, this cause duly comes on to be heard on the regular call of the calendar, Plaintiffs appearing by their solicitors, House, Holmes, Roddy, Butler & Jewell, by William M. Clark, and the Defendants appearing by their solicitors, Wood, Chesnutt & Smith, by James W. Chesnutt; and the cause is submitted to the Court upon the complaint, proof of service of summons within the time and manner required by law, Defendants' answer and cross-complaint, Plaintiffs' response thereto, stipulations entered into by the parties, and exhibits to said stipulations, testimony *ore tenus* of witnesses, written briefs and argument of counsel, from all of which the Court finds and concludes:

1. That the allegations made in the pleadings which were admitted by the parties are true and correct.

2. That the matters stipulated by the parties are true and correct as stipulated.

3. That the agreement between the United States and the City of Hot Springs, entered into in final written form in 1935, attached to the Complaint as Exhibit D, relating to the sewer system of the City, did, by its terms, provide that the cost of all repairs, alterations, maintenance and operation of the sewer system of the City of Hot Springs would be borne by other than United States Government sources and that the term, "United States Government sources," included the Plaintiffs in this pro-

ceeding, they being beneficiaries of the agreement, that the Defendants have received the benefits of the agreement, but that the agreement is *ultra vires* and invalid in purporting to bind the City so as to preclude it forever from imposing charges for such costs against Plaintiffs, including the particular sewer charges under Ordinance 2444 and 2449 of the City found hereinbelow to be due from Plaintiffs.

4. That the previous chancery proceeding, Docket No. 12972 in this Court, the entire record of which is in evidence in this proceeding, does not operate, as and by *res judicata*, to bar or preclude the imposition of the sewer charges found to be due hereinbelow.

5. That the Defendants are not estopped from imposing the sewer charges hereinbelow found to be due.

6. That Ordinance Nos. 2444 and 2449 of the City of Hot Springs and the statutes of the State of Arkansas, governing sewer charges, Volume 2 Ark. Stats. 1947 Annotated, Sections 19-4101 through 19-4122, and the imposition thereunder of sewer charges upon Plaintiffs calculated as hereinbelow provided, and the construction of said ordinance and statutes and their application to Plaintiffs so as to impose said charges upon them are valid and not repugnant either to the Constitution of Arkansas or the Constitution or laws of the United States.

7. That the rights, titles, privileges and immunities of Plaintiffs under the Constitution of Arkansas, the Constitution of the United States (including, and without limiting the foregoing, those under the provisions cited in the pleadings and Article 1, Section 8, Clause 17 thereof), statutes of Arkansas, statutes and laws of the United States and authority exercised under each and all of the foregoing, all of which rights, titles, privileges and immunities have been specially set up or claimed in this proceeding, are not impaired, abridged or violated by the imposition of the sewer charges hereinbelow found to be due from Plaintiffs by virtue of Ordinance Nos. 2444 and 2449, and Plaintiffs are not deprived of any of same by said sewer charges or by the application of said ordinances to Plaintiffs to the extent of those particular charges.

8. That each respective Plaintiff is liable for sewer charges in an amount calculated upon the basis of its consumption of water from and provided to it by the municipally owned city water system only, as reduced by the volume of said water which is consumed but which is so used that it does not reach the city sewer system; that hot mineral water provided to Plaintiffs by the National Park Service of the United States Government from its hot springs and discharged into the City sewer system should be excluded from the computation of sewer charges to be made against Plaintiffs under Ordinance 2444 establishing sewer charges for the City of Hot Springs; that Plaintiffs are not liable for sewer charges calculated upon the basis of their consumption of such hot mineral water; and that Defendants (Cross-Complainants), City of Hot Springs and the Hot Springs Sewer Committee, are entitled to judgment against the respective Plaintiffs for sewer charges for water provided to the Plaintiffs from the Hot Springs Municipal Water System and discharged by Plaintiffs into the sewer system of the City of Hot Springs, Arkansas, for the period November 1953 through April 1957, in the following amounts:

Lamar Bath House	$543.30
Buckstaff Bath House Company	354.30
Ozark Bath House Company	279.60
Quapaw Bath House Company	669.30
Fordyce Bath House	678.60
Maurice Bath House	438.30
Hale Bath House	160.20
Superior Bath House	172.20.

9. That no penalties or attorney's fees are due to Defendants (Cross-Complainants) from the Plaintiffs.

WHEREFORE, IT IS CONSIDERED, ORDERED, ADJUDGED AND DECREED:

That defendants, City of Hot Springs, Arkansas, and Hot Springs Sewer Committee, be and they hereby are enjoined and restrained from levying and collecting sewer charges from Plaintiffs for, or calculated on the basis of, water provided to Plaintiffs by the United States Govern-

ment, National Park Service, and discharged into the sewer system of the City of Hot Springs;

That Defendants, City of Hot Springs and Hot Springs Sewer Committee, are hereby granted judgment for, and shall have and recover from the respective Plaintiffs, sewer charges for water provided to the respective Plaintiffs by the Hot Springs Municipal Water System and discharged into the sewer system of the City of Hot Springs, Arkansas, for the period from November 1953 through April 1957, in the following respective amounts, the amount applicable to and against each Plaintiff being set forth opposite its name:

Lamar Bath House	$543.30
Buckstaff Bath House Company	354.30
Ozark Bath House Company	279.60
Quapaw Bath House Company	669.30
Fordyce Bath House	678.60
Maurice Bath House	438.30
Hale Bath House	160.20
Superior Bath House	172.20.

That the claims and prayers of the Complaint, except to the extent of the relief granted hereinabove, be and they are hereby dismissed; that the claims and prayers of the Cross-Complaint, except to the extent of the judgments hereinabove awarded against Plaintiffs, respectively, be and they are hereby dismissed; and that each party hereto shall bear his or its own costs herein.

And the parties hereto object and except to the findings, conclusions, rulings and judgments made, reached and rendered herein, other than the findings and conclusions numbered 1 and 2, each party Plaintiff and each party Defendant making it known to the Court that he or it desires the Court to find each issue in its favor, grant it all relief prayed in his or its pleadings herein and deny any and all relief prayed in the pleadings of his or its opposing parties herein, the foregoing matters being hereby noted of record; and all parties hereto pray appeals from this decree to the Supreme Court of Arkansas, which appeals are hereby granted.

2. Decree of Supreme Court of Arkansas.

(T. 144)

IN THE SUPREME COURT OF ARKANSAS

MAY TERM 1958 June 16, 1958

Title omitted (Docket No. 1536)

DECREE

This cause came on to be heard upon the transcript of the record of the chancery court of Garland County, and was argued by solicitors; on consideration whereof it is the opinion of the Court that there is no error in the proceedings and decree of said chancery court in this cause on the direct appeal.

It is therefore ordered and decreed by the Court that on the direct appeal the decree of said chancery court be and it is hereby affirmed.

On the cross appeal of appellees it is the opinion of the Court that the chancery court erred in denying appellees the right to base sewer service charges on the total volume of all water discharged into the sewers, including the hot mineral water.

It is therefore ordered and decreed by the Court that so much of said decree be and it is hereby reversed, annulled and set aside with costs, and that this cause be remanded to said chancery court with directions to enter a decree consistent with the opinion herein delivered.

It is further considered that said appellees recover of said appellants all their costs in this Court, in this cause expended, and have execution thereof. McFaddin, J., dissents.

3. Opinion, June 16, 1958.

(T. 135)

SUPREME COURT OF ARKANSAS

Title omitted (No. 1536).

J. SEABORN HOLT, *Associate Justice*

In 1934 the City of Hot Springs entered into an agreement with the National Park Service, Department of Interior, relative to the construction of a city sewer system and sewage plant in Hot Springs. The parties recognizing that Hot Springs' reservation, including appellants' bath houses located thereon, contributed largely to the city's sewage, the Park Service agreed to pay 22.5 percent of the construction cost and an additional 5 per cent in *lieu* of maintenance and operation charges. Park Service in the aggregate contributed $82,000. Appellants' bath houses furnished no part of the consideration. The agreement contained this recital: "1. That the Government be not charged for any service or use of the system at any time in the future. 2. That the cost of all repairs, alterations, maintenance and operation of the system be borne by other than the United States government sources. Necessary replacements of the entire plant due to natural or human destruction not to be considered a part of paragraph 2." The balance of the cost of construction was paid partly by the U. S. Public Works Administration and partly by a city bond issue of $175,000, financed by a 1.5 mill *ad valorem* tax on the property within the city. In 1934 the 1.5 mill tax was extended against appellants' property and assessed for taxation. In July 1935 appellants obtained a temporary restraining order against the collection of this tax, setting up the agreement as a defense. Thereafter, in 1945, on the city's motion to dissolve the injunction and for a decree for past due taxes, the court held, in effect, that appellants were U. S. government sources within the meaning of the agreement and enjoined the city from assessing and collecting the 1.5 mill tax against them. There was no appeal from this decree.

The record reflects that by 1952, the city sewage disposal plants were obsolescent, inadequate and heavily

overloaded, creating a serious health problem, and the pollution of Lakes Hamilton and Catherine. A thorough engineering study was made resulting in recommendations to the city to enlarge, overhaul and repair the disposal system and to change the method of purifying the city sewage. Following this recommendation and to cover the cost and properly proceeding under the provisions of Act 132 of 1933 (Sec. 19-4101 etc. Ark. Stats. 1947), the city caused bonds to be issued in the amount of $786,000, which were to be financed by a sewer service charge. It appears that prior to this time the city had never levied any sewer service charge. Sewer service charge rates were set forth in Ordinance 2444 by the city. Following the completion of the work, sewer service charges were made against and sent to appellants and other users of the system. Charges to appellants were calculated upon the total volume of sewage discharged by them from their bath houses into the sewer system, and included both the city water and also the hot mineral water furnished by the National Park Service. Appellants operate commercial bath house companies located on the U. S. reservation and are large consumers of water, and large contributors to the water that goes through the sewage system. There was evidence that in 1952 appellants discharged 57,365,500 gallons of sewage into the system, or about 7.5 percent of the total flow. In 1953 the total number of gallons discharged was 55,705,800, or 7.5 percent of the total flow. Appellants refused to pay to the city any sewer service charges and in 1955 brought the present suit to enjoin collection. In the trial court, and here on appeal, appellants relied on the following points: "1. The agreement is valid, and imposition of sewer charges upon appellants is an unconstitutional impairment of contract. 2. The validity of the agreement is *res judicata*. 2. Appellees are estopped to assert any invalidity in the agreement and from imposing sewer charges upon appellants. 4. The city had no legislative or territorial jurisdiction to impose sewer charges upon appellants, and the trial court had no jurisdiction to render judgment against them. 5. No claim or judgment *in personam* could lawfully be made or rendered against appellants. 6. In no event could any charge be calculated against appellants

on volume of hot mineral water from the National Park springs."

Appellees defended primarily on the ground that their agreement or contract relied upon by appellants was *ultra vires* as applied to the sewer service charge, asserted their right to collect these service charges from appellants and in a cross complaint asked for a judgment for the full amount of the unpaid sewer service charges not only for the city water but also for the hot mineral water furnished by the National Park Service which, as indicated, was also discharged through the sewer system. Upon a hearing the trial court held that the contract or agreement of 1934 was valid as to the 1.5 mill *ad valorem* tax for the original construction, but *ultra vires* as applied to the present sewer service charges, and that appellants were liable only for the amount of city water discharged into the sewers and not for the hot mineral water. The court also disallowed the city's claim for penalties and attorney's fees. It appears that all bonds for the original construction under the 1.5 mill tax are paid and this tax is no longer levied. The case is before us on appellants' direct appeal and a cross appeal of appellees.

The primary, if not the decisive, question presented is whether the above agreement between the city and the National Park Service is *ultra vires* in the circumstances here. We hold that it was in so far as it would estop or deny the City of Hot Springs the right and power now or at any future time, in the exercise of its police powers to enforce collection of sewer charges against appellants. The city not only has the right in exercising its legislative and governmental functions to protect the health, safety and general welfare of its people, but it is its duty to do so and may not contract away any such right. "A municipality cannot bind itself by a perpetual contract, or by one which lasts an unreasonable length of time . . . It is declared to be against public policy to permit a municipal corporation to part with any of its legislative power. In the absence of a clear grant of power from the legislature, the municipal authorities can do nothing which amounts in effect to the alienation of a substantial right of the public. It cannot obligate itself not to exercise such powers, and

a contract in which it purports to do so, even upon valuable consideration, is void. Thus, a municipal corporation cannot, by contract or otherwise, divest itself of its general police power, or of the power of eminent domain which has been delegated to it by the legislature, or of the power of taxation," *Risser* v. *City of Little Rock*, 225 Ark. 318, 281 S. W. 2d 949.

In effect, the same issues as here were presented to the Supreme Court of Ohio in *State ex rel. Gordon* v. *Taylor, et al.*, 79 N. E. 2d 127. In that case Ohio State University refused to pay a bill for sewer service charges presented by the City of Columbus on the ground that it had many years before entered into an agreement with the city under the terms of which it had conveyed to the city an easement across University property for sewer purposes in consideration of "the right and privileges to the Board of Trustees, and to the Ohio State University, to use the city sewers on the campus of said university without cost or expense to said university, or its Board of Trustees." In rejecting the university's defense, that court used this language: "The language of the grant of easement involved herein, if construed as contended by counsel for the respondents, would be so broad and comprehensive as to vest in the university the right to use the city sewer and the benefit of the city's sewerage system without restriction or limitation, and without liability for any future charge or expense of maintenance, renewal or additional facilities required by any change of conditions . . . If the University is completely exempted from any charge therefor and is privileged, without any limitation or restriction, to empty into the city sewers all the sewage from the campus, the boundaries of which are not defined or limited and may be indefinitely extended, such exemption could be held valid only if the city, notwithstanding its duty and obligation to protect the health, safety and welfare of the citizens of Columbus, is authorized to relinquish as to the university property the powers and prerogatives vested in the municipality and to contract away its duty and obligation to require all users of the city sewerage system to pay proportionately the cost and expense of an essential municipal function. In the construction of a sewerage system, a municipality acts in a governmental capacity, and, hence, in

accepting the grant of easement subject to the right of the university to use the sewer would be *ultra vires*, if by such exemption the city bargained away all its duties and obligations with reference to maintenance of such sewer and agreed to forever maintain it for the benefit of the university. It is only in the maintenance of a sewerage system that the city acts in a ministerial or proprietary function. *City of Portsmouth* v. *Mitchell Mfg. Co.*, 113 Ohio St. 250, 148 N. E. 846, 43 A. L. R. 961." (*State* v. *Taylor*, 79 N. E. 2d 127 *supra*)

"The supervision and regulation of the sewers is a police function of the city. Therefore, in granting permission for the use of the sewers in the first instance and for the continuing use thereof, the city must at all times retain control, and any attempt by way of contract to deprive the city of that control is void. The police power of the city cannot be bargained away by contract, but must at all times be available for use to meet such public needs as may arise. McQuillin, Municipal Corporations, 2d Ed. Rev. Secs. 393, 1564," *Ericksen* v. *City of Sioux Falls*, 14 N. W. 2d 89. ". . . an indefinite exemption, the purpose or amount of which is not reasonably ascertainable, is not only *ultra vires*, but is also against public policy," *City of Cleveland* v. *Edwards*, 143 N. E. 181, 37 A. L. R. 1352. ". . . in the absence of express grant of power, a municipal corporation has no authority to make contracts for the exemption or commutation of local assessments," *McQuillin, 3rd Ed., 14, Sec. 38.86.* Cases from Delaware, Indiana, Kentucky, Massachusetts, Mississippi, Missouri, New York, Wisconsin and Ohio are cited to support the text.

Appellants have presented for our consideration a large number of cases in their effort to uphold the validity of the above agreement between the city and the National Park Service, however, upon examination of each of these cases there appears to have been statutory or constitutional authority which permitted the municipality to enter into the contract in question. As pointed out above, in the present case we find no authority or express grant of power, statutory or otherwise, giving to the City of Hot Springs the authority to exempt appellants here from the sewer

service charge in question. "A common council 'cannot bargain away or divest itself of the right to make reasonable laws, and to exercise the police power whenever it becomes necessary to conserve or promote the health, safety or welfare of the community.' So, power conferred upon a city to contract respecting a particular matter does not confer power, by implication, so to contract with reference thereto as to embarrass and interfere with its future control over the matter, as the public interests may require. Hence, all contracts which interfere with the legislative or governmental functions of the municipality are absolutely void." *McQuillin, 3rd Ed. Vol. 10, Sec. 29.07.*

It appears practically undisputed here that when this bond issue of $786,000 was made that the City of Hot Springs was faced with a serious problem of sewage disposal, affecting the health and well being of its inhabitants, and we see no valid reason, and appellants have pointed to none, why appellants who are citizens and conducting their businesses in that municipality should not pay their just share, through sewer service charges, of this necessary improvement for the public good.

Appellants' contention that "the validity of the agreement is *res judicata*" cannot be sustained. As we have heretofore stated, "the police power of a city must at all times be available for use to meet such public needs as may arise." It does not appear from the record that any such need existed in 1935 when a temporary restraining order was obtained or in 1945 when it was made permanent. Consequently, at those times, there was no occasion for the city to exercise its police powers. On the other hand it appears now that such a need does exist and consequently there is an occasion for the city to exercise its police powers.

On the contention of appellants that the city is estopped, little need be said in addition to what we have set out above. Since we are holding that the contract or agreement here in question is *ultra vires*, then the city may not be estopped to deny its invalidity. ". . . contracts which the corporation is not permitted legally to enter into are not subject of ratification, and a city may not be estopped to deny the invalidity of a contract that is *ultra*

rires in the sense that it is not within the power of the municipality to make," *McQuillin, 3rd Ed. Vol. 10, Sec. 29.104, p. 422.*

On cross appeal appellees contend that there was error in the trial court's decree in denying them the right to base sewer service charges on the total volume of all water which appellants discharged into the sewers, which included both the city water and the hot mineral water. We agree that this contention should be sustained. It appears that the basis of the sewer service charge is based on the volume of sewage discharged into and through the sewers. The record reflects that the water consumption for the calendar year 1952 was used as a basis for sewer charges for period from October 1953 through September 1954. This water, which was emptied into the sewers, amounted to approximately 4,452,800 gallons of city water and 52,912,700 gallons of hot mineral water. For 1953 the volume of city water was slightly greater and that of the hot mineral water somewhat less. As indicated, sewer service charges are based on the use of the system. Appellants used the water in their businesses in which, obviously, they seek to make a profit, and we can see no just reason why they should not be required to share, along with all other users of sewers, the cost burden of disposing of this water through the sewer system.

We hold that there was no error in denying to appellees the penalties and attorney's fees as provided in *Sec. 19-4113 Ark. Stats. 1947.* This statute is penal in its nature and must, therefore, be strictly construed. It provides in part: "If any service rate or charge so established shall not be paid within thirty days after the same is due, the amount thereof, together with a penalty of ten percent, and a reasonable attorney's fee, may be recovered by the sewer Committee . . ." This provision says that penalties "may be recovered" not that they must be. The trial court is thus granted a reasonable discretion in denying or allowing penalties depending on the facts and circumstances. "It is a general rule of statutory construction that penal statutes are to be strictly construed. Statutes imposing penalties are subject to this rule of strict construction. They will not be construed to include any-

thing beyond their letter, even though within their spirit. The rule that penal laws are to be construed strictly is perhaps not much younger than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." 23 *Am. Jur., Forfeitures and Penalties*, Sec. 37, p. 631. We find no abuse of that discretion here.

Accordingly, the decree is affirmed on direct appeal, on appellees' cross appeal the decree is reversed and remanded with directions to enter a decree consistent with this opinion.

Mr. Justice McFaddin dissents.

4. Decree in previous suit, October 23, 1945.

(T. 45; R. 103 and Exhibit 11, p. 52)

IN THE GARLAND CHANCERY COURT

LAMAR BATH HOUSE COMPANY, SUPERIOR BATH HOUSE, HALE BATH HOUSE, MAURICE BATHS, FORDYCE BATHS, INC., QUAPAW BATHS, OZARK BATH HOUSE, BUCKSTAFF BATHS ..... *Plaintiffs.*

VS. No. 12972

MACK WILSON, TAX COLLECTOR OF GARLAND COUNTY, ARKANSAS, CITY OF HOT SPRINGS, ARKANSAS, LEO P. MCLAUGHLIN, MAYOR OF THE CITY OF HOT SPRINGS, ARKANSAS, JAY ROWLAND, A. T. DAVIES, CITY ATTORNEY OF THE CITY OF HOT SPRINGS, ARKANSAS AND ROY C. RAEF, COUNTY CLERK OF GARLAND COUNTY ..... *Defendants.*

INJUNCTION AND RESTRAINING ORDER

On this day come the plaintiffs by Wootton, Land & Matthews, their solicitors, and come the defendants by their solicitors, Jay Rowland and Curtis Ridgway:

And it appearing to the Court that the defendants and each of them in this cause have entered their appearance herein and consented that this cause may be submitted to the Court for its consideration, decision and judgment

upon the complaint and its exhibits, and demurrers thereto filed on behalf of the defendants, the temporary injunction and restraining order heretofore granted in this cause, and the motion to dissolve temporary injunction and render judgment for past due taxes, filed by the defendants herein, and this action being reached upon the call of the calendar is submitted to the Court for its consideration and final judgment upon the complaint, with its exhibits and demurrers thereto, the temporary injunction and restraining order heretofore entered herein, and the motion to dissolve temporary injunction and rendered judgment for past due taxes, the certified copy of resolution of the City Council of Hot Springs, Arkansas, bearing date of July 1, 1935, and reciting the inclusion of the Bath Houses located on the Hot Springs National Park Reservation in the agreement entered into by and between the City of Hot Springs and the Hot Springs National Park, said resolution being introduced by agreement of counsel and pursuant to stipulation of counsel that it is a true and correct copy of the resolution as adopted by the City Council of Hot Springs, Arkansas, July 1, 1935, and approved by Leo P. McLaughlin, Mayor; upon testimony of Thomas J. Allen and George C. Bolton, taken *ore tenus* at the bar of the Court, said testimony being reduced to writing by Allen Watkins, Court Stenographer, who had been first sworn by the Court to truly take and transcribe the testimony adduced in the cause.

The Court being well and sufficiently advised as to all matters of fact and law arising herein and the premises being fully seen, doth find all issues of fact and law in favor of the plaintiff and against the defendant in this cause.

It is, therefore, by the Court considered, ordered, adjudged and decreed that the plaintiffs be, and they are hereby granted the relief for and from the matters complained of in their complaint; and the Court doth order, adjudge and decree that the temporary injunction heretofore entered herein be made permanent, and, the Court doth order and adjudge that Mack Wilson, Tax Collector of Garland County, Arkansas, The City of Hot Springs, Arkansas, Leo P. McLaughlin, Mayor of the City of Hot Springs, Arkansas, Jay Rowland, City Attorney of the City of Hot

Springs, Arkansas, and Roy C. Raef, County Clerk of Garland County, Arkansas, and the agents and successors in office of each and every one of them, be forever enjoined and restrained from pursuing or continuing the matters complained of in the complaint of the plaintiffs filed herein: that Mack Wilson, Tax Collector of Garland County, Arkansas, his agents and successors in office, be, and he is hereby forever enjoined and restrained from collecting or attempting to collect from the plaintiffs herein the 1.5 mill tax levied by the City of Hot Springs, Arkansas, by Ordinance adopted and approved February 1, 1934, and from refusing to accept the taxes due the State of Arkansas and Garland County, Arkansas, from the plaintiffs herein without the payment of said levy, that the City of Hot Springs, Arkansas, Leo P. McLaughlin, Mayor of the City of Hot Springs, Arkansas, and Jay Rowland, City Attorney of the City of Hot Springs, Arkansas, and their agents and successors in office and each of them are forever enjoined and restrained from collecting or attempting to collect from the plaintiffs herein the 1.5 mill tax levied by the City of Hot Springs, Arkansas, by Ordinance adopted and approved February 1, 1934; and that Roy C. Raef, County Clerk of Garland County, Arkansas, his agents and successors in office are forever restrained and enjoined from extending on the Tax Books of Garland County, Arkansas, the 1.5 mill tax levied by the City Council of the City of Hot Springs, Arkansas, by Ordinance adopted February 1, 1934, against the property of the plaintiffs in this cause.

That the Clerk do issue under the seal of this Court the order and injunction herein allowed.

To which ruling of the Court the defendants at the time duly excepted and prayed an appeal to the Supreme Court of the State of Arkansas, which is hereby granted.

APPENDIX B

Ordinances, statutes, Agreement and constitutional provisions.

(T. 12: R. 31)

1. Ordinance 2444 of the City of Hot Springs, Arkansas. (August 17, 1953.)

An Ordinance Fixing the Rates to Be Charged for Municipal Sewer Services in the City of Hot Springs, Arkansas and Declaring an Emergency.

WHEREAS, the City of Hot Springs, Arkansas, has found it necessary to make extensive improvements in the municipal sewer system which will call for the expenditure of a large sum of money, to be financed by a proposed issue of $985,000 in sewer revenue bonds, and this makes it necessary to revise the charges for sewer services; . . .

BE IT ORDAINED by the City Council of the City of Hot Springs, Arkansas:

SECTION 1. The following schedule of sewer charges shall apply to all sewer service rendered by the City of Hot Springs:

All monthly sewer charges shall be based upon water consumption. All customers shall be classified as either domestic or commercial customers by the Sewer Committee, depending upon whether the water consumption for the individual customer is used for domestic or commercial purposes. In the case of domestic customers the average monthly water consumption for the months of January, February, March, April, November, and December of the calendar year preceding that in which the bills are rendered shall be computed separately for each customer, and a uniform monthly charge for each customer for each calendar year shall be determined by applying the following schedule of rates to the said average monthly usage. In the case of commercial customers the average monthly water consumption for the calendar year preceding that in which the bills are rendered shall be computed separately for each customer, and a uniform monthly sewer charge for each customer for each calendar year shall be determined by applying the following schedule of rates to the said aver-

age monthly usage; except that in the case of a commercial customer where an appreciable percentage of his total water consumption is so used that it does not reach the sanitary sewer, then the Sewer Committee shall determine the percentage of total water usage which does reach the sanitary sewer, and the following schedule of rates shall apply to that percentage only.

SCHEDULE OF RATES

Minimum—$0.50 per month

First 25,000 gals. water consumption per mo.
$0.22 per 1000 gals.

Next 25,000 gals. water consumption per mo.
0.195 per 1000 gals.

Next 30,000 gals. water consumption per mo.
0.17 per 1000 gals.

Next 70,000 gals. water consumption per mo.
0.145 per 1000 gals.

Next 750,000 gals. water consumption per mo.
0.11 per 1000 gals.

Next 750,000 gals. water consumption per mo.
0.1025 per 1000 gals.

All over 1,650,000 gals. water consumption per mo.
0.085 per 1000 gals.

Connection Charge: No connection charge shall be made for the future connection of customers to the system prior to 1956. During the calendar year of 1956 a connection charge of $10 shall be made, and this charge shall increase $10 for each calendar year thereafter, but shall not exceed $70.

Billing: All bills for sewer service shall be rendered monthly and shall cover the same period as the corresponding monthly water bill. All bills shall be rendered in the net amount due. Under the provisions of Section 19-4113, Arkansas Statutes 1947, a lien is fixed upon the land for any unpaid sewer service charge, even though the use of the sewer system may be by a tenant or lessee instead

of the owner, but vacant unoccupied property not actually using the sewer system shall not be subject to a service charge. The burden of proving non-use during vacancy shall rest upon the owner of the property. If any charge is not paid before the tenth day after the date of billing, a penalty of ten per centum shall be added, and if not paid within thirty days after the date of billing, the statutory lien may be enforced by suit in chancery court for the delinquent service charge plus the penalty plus a reasonable attorney fee, to be fixed by the court.

SECTION 2. It is hereby ascertained and declared that the City of Hot Springs has under consideration the construction of extensive and greatly-needed improvements and additions to its municipal sewer system; therefore, an emergency exists and this ordinance, being necessary for the preservation of the public peace, health and safety, shall become effective immediately upon its passage.

2. Ordinance 2449 of the City of Hot Springs, Arkansas. (October 12, 1953.)

(T. 16; R. 35)

WHEREAS, the City of Hot Springs, Arkansas, owns and operates a municipal sewer system which is free of debt but which needs to be improved and extended in order to give adequate service to the inhabitants of the City; . . . BE IT ORDAINED by the City Council of the City of Hot Springs, Arkansas:

SECTION 1. The Council hereby declares its intention to construct the sewer facilities as planned by the engineers for the project, which are briefly described as follows: The enlargement and rehabilitation of existing sewage treatment facilities (the new improvements are sometimes hereinafter termed the "Works" and the new improvements and the existing municipal sewer system combined are sometimes hereinafter termed the "System"). Subject to the authorization granted by Ordinance No. 2441 of the City, passed and approved July 20, 1953, creating the Sewer Committee, the construction shall be under the control and supervision of said Sewer Committee, and after construction, the System shall be under the management of said Committee.

SECTION 3. That in order to provide funds to pay the cost of construction of the Works, there are hereby authorized to be issued negotiable coupon revenue bonds of the City of Hot Springs in the aggregate principal amount of $830,600, each of which shall be designated as "Sewer Revenue Bond." . . .

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SECTION 6. . . . The income and revenues from such operation shall be set aside into a separate and special fund hereby created and designated "Sewer Fund." Such income and revenues are hereby pledged, and shall be applied, to the payment of the operation, repair, extension, betterment, and maintenance of the System, to the payment of all bonds issued under this ordinance and secured hereby and the interest thereon, and to provide an adequate depreciation fund, in the manner hereinafter set out.

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SECTION 12. By the provisions of said Act No. 132, as amended, the payment of the sewer service charges is secured by a lien upon the premises served by the System. Said charges shall constitute a lien upon the fee title to the land and permanent improvements, even though the occupant receiving the benefit of the service for which the rate or charge is due has merely a leasehold interest (or other lesser estate) in the premises. If any service rate or charge so established shall not be paid within thirty days after the same is due, the amount thereof, together with a penalty of ten per centum and a reasonable attorney's fee, may be recovered by a chancery suit filed in the Chancery Court of Garland County, and the City agrees to bring foreclosure suits for past due service charges.

SECTION 13. The owner or owners of all improved property lying within the area that is now served or will, after the proposed improvements have been made, be served by the System, are hereby directed and required to connect all toilet and waste water facilities of such improved property with said System as soon as the service is available; and the owners of property that is improved after the completion of the improvements to the System

and can be served by the System shall immediately connect the toilet and waste water facilities of such property with the System.

SECTION 14. The Sewer Committee shall send a written notice to any owner of improved property that can be served by the System but is not connected, to make such connection within thirty days from the date of said notice; and any property owner failing or refusing to connect his improved property with the System after being notified to do so shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not less than two dollars and not exceeding ten dollars, and each day's failure or refusal after expiration of the time fixed in the notice to make the connection shall be a separate offense; provided, nothing in this ordinance shall be so construed as to compel the building of a sewer by one property owner over the property of another, or for a greater distance from his property through or into any street or alley than three hundred (300) feet to a place where a connection can be made to the System.

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SECTION 15. . . .

(p) It is hereby declared that the provisions of this ordinance constitute a contract by and between the City and the holders of the bonds and interest coupons issued by authority hereof; and after the bonds have been issued and paid for, the terms of said provisions shall not be changed except with the written consent of the holders of all bonds and coupons then outstanding.

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3. Arkansas sewer statute. Act 132 of 1933. Vol. 2 Arkansas Statutes 1947 Annotated (Official Ed.) Section 19-4101 et seq.

19-4101. Every city (of either the first or second class) and town in the State of Arkansas is hereby authorized and empowered to own, acquire, construct, equip, operate and maintain within and/or without the corporate limits of such city or town, a sewage collection system and/or a sewage treatment plant or plants, intercepting

sewers, outfall sewers, force mains, pumping stations, ejector stations and all other appurtenances necessary or useful and convenient for the collection and/or treatment, purification and disposal, in a sanitary manner of the liquid and solid waste, sewage, night soil and industrial waste of such city or town, and shall have authority to acquire by gift, grant, purchase, condemnation, or otherwise, all necessary lands, rights-of-way and property therefor, within and/or without the corporate limits of such city or town, and to issue revenue bonds to pay the cost of such works and property. The term "works," where hereinafter used in this act, shall be construed to mean and include such structures and property. No obligation shall be incurred by the municipality in such construction or acquisition except such as is payable solely from the funds provided under the authority of this act.

19-4102. The construction, acquisition, improvement, equipment, custody, operation and maintenance of any such works for the collection, treatment or disposal of sewage and the collection of revenue therefrom for the service rendered thereby, shall be effected and supervised by a Committee to be designated for such purpose by the Municipal Council; which Committee, however, will act under the control of the Council to such extent as may be provided in the ordinance or resolution appointing the Committee . . .

19-4103. The Sewer Committee shall have power to take all steps and proceedings and to make and enter into all contracts or agreements necessary or incidental to the performance of its duties and the execution of its powers under this act; . . . The Sewer Committee may employ engineers, architects, inspectors, superintendent, manager, collectors, attorneys, and such other employees as in its judgment may be necessary in the execution of its powers and duties, and may fix their compensation, all of whom shall do such work as the Committee shall direct. All such compensation and all expenses and liabilities incurred in carrying out the provisions of this act shall be paid solely from funds provided under the authority of this act, . . . After the construction, installation, and completion of the works or the acquisition thereof, the

Sewer Committee shall operate, manage and control the same and may order and complete any extensions, betterments and improvements of and to the works that it may deem expedient, if funds therefor be available or are made available as provided in this act, and shall establish rules and regulations for the use and operation of the works, and of other sewers and drains connected therewith so far as they may effect the operation of such works, and do all things necessary or expedient for the successful operation thereof . . .

19-4104. Before any city or town shall construct or acquire any works under this act, the Municipal Council shall enact an ordinance or ordinances which shall (a) set forth a brief and general description of the works . . .; (b) set forth the cost thereof estimated . . .; (c) order the construction . . . of such works; . . . (e) direct that revenue bonds of the city . . . shall be issued . . . (f) contain such other provisions as may be necessary in the premises.

19-4105. Every such city or town shall have power to condemn any such works to be acquired, and any land, rights, easements, franchises and other property, real or personal deemed necessary or convenient for the construction or any such works, or for extensions, improvements, or additions thereto, and in connection therewith may have and exercise all the rights, powers and privileges of eminent domain granted to cities and towns under the laws relating thereto. Title to property condemned shall be taken in the name of the city or town . . .

• • •

19-4110. Any specified portion of the proceeds of an issue of bonds authorized under this act (§§ 19-4101—19-4122) may be allocated by the Municipal Council to any particular project; or to new construction (as distinguished from the purchase of works already constructed) or *vice versa*; . . .

19-4111. In the discretion of the Municipal Council or Sewer Committee, such bonds may be secured by a trust indenture by and between the city or town and a corporate

trustee, which may be any domestic or non-resident trust company or bank having the powers of a trust company, and such trust indenture may convey or mortgage the works or any part thereof . . .

19-4112. At or before the issuance of any such bonds the Council shall by said ordinance create a sinking fund for the payment of the bonds and the interest thereon and the payment of the charges of banks or trust companies for making payment of such bonds or interest, and shall set aside and pledge a sufficient amount of the net revenues of the works, hereby defined to mean the revenues of the works remaining after the payment of the reasonable expense of operation, repair and maintenance, such amount to be paid by the Sewer Committee into said sinking fund at intervals to be determined by ordinance prior to issuance of the bonds, for (a) the interest upon such bonds as such interest shall fall due, and (b) the necessary fiscal agency charges for paying bonds and interest; (c) the payment of the bonds as they fall due, or, if all bonds mature at one time, the proper maintenance of a sinking fund sufficient for the payment thereof at such time and (d) a margin for safety and for the payment of premiums upon bonds retired by call or purchase as herein provided, . . . After the payments into the sinking fund as herein required, the Sewer Committee may at any time in its discretion transfer all or any part of the balance of the net revenues, after reserving an amount deemed by the Sewer Committee sufficient for operation, repair and maintenance for an ensuing period of not less than twelve months and for depreciation, into the sinking fund or into a fund for extensions, betterments and additions to the works.

19-4113. The Council of the city or town shall have power, and it shall be its duty, by ordinance to establish and maintain just and equitable rates or charges for the use of and the service rendered by such works, to be paid by each landowner whose premises are connected with, and use, such works by or through any part of the sewerage system of the city or town, or whose premises in any way use, or are served by, such works; and the council may change and readjust such rates or charges from time to time to such extent as will not render insecure the rights of

the holders of revenue bonds or violate any sinking fund agreement, or other lawful agreement, with such bondholders. It is the intention of this act that a landowner shall be liable for such service charge even though the use of the sewer system is by his tenant or lessee; but vacant, unoccupied property not actually using such works shall not be subject to a service charge. Such rates or charges shall be sufficient in each year for the payment of the proper and reasonable expense of operation, repair, replacements and maintenance of the works and for the payment of the sums herein required to be paid into the sinking fund. Revenues collected pursuant to this section shall be deemed the revenues of the works . . . The aggregate of the rates or charges shall always be sufficient for such expense of operation, repair and maintenance and for such sinking fund payments. All such rates or charges if not paid when due shall constitute a lien upon the premises served by such works; said charges to constitute a lien upon the fee title to the land and permanent improvements even though the occupant receiving the benefit of the service for which the rate or charge is due has merely a leasehold interest (or other lesser estate) in the premises. If any service rate or charge so established shall not be paid within thirty days after the same is due, the amount thereof, together with a penalty of ten per cent, and a reasonable attorney's fee, may be recovered by the Sewer Committee in a Chancery suit, filed in the Chancery Court of the county where the works (or the greater part of them) shall be located, in the name of the city or town or in the name of the Trustee under the indenture securing the revenue bonds, or in the name of the bondholders (To such extent as their right to sue in their own name may be permitted under the Indenture), in which suit said lien may be foreclosed against such lot, parcel of land or building.

* * *

19-4116. Any city or town operating a sewage collection system and/or sewage disposal works as defined in this act or which as herein provided has ordered the construction or acquisition of such works (in this section called the owner) is hereby authorized to contract with one or more other cities, towns or political subdivisions

within the state (in this section called the lessee), and such lessees are hereby authorized to enter into such contracts with such owners, for the service of such works to such lessees and their inhabitants, but only to the extent of the capacity of the works without impairing the usefulness thereof to the owners, upon such terms and conditions as may be fixed by the Sewer Committee or Sanitary Board and approved by ordinance of the respective contracting parties; Provided, however, that no such contract shall be made for a period of more than fifteen years or in violation of the provisions of said ordinance authorizing bonds hereunder or in violation of the provisions of said trust indenture. The lessee shall by ordinance have power to establish, change and adjust (so far as will not impair the rights of bondholders) rates and charges for the service rendered therein by the works against the owners of the premises served, in the manner hereinbefore provided for establishing, changing and adjusting rates and charges for the service rendered in the city or town where the works are owned and operated, and such rates or charges shall be collectable and shall be a lien as herein provided for rates and charges made by the owner. The necessary intercepting sewers and appurtenant works for connecting the works of the owner with the sewerage system of the lessee shall be constructed by the owner and/or the lessee upon such terms and conditions as may be set forth in said contract, and the cost or that part of the cost thereof which is to be borne by the owner may be paid as a part of the cost of the works from the proceeds of bonds issued under this act unless otherwise provided by said ordinance or trust indenture prior to the issuance of the bonds . . .

* * *

19-4119. Any holder of any such bonds or any of the coupons attached thereto, and the trustee, if any, except to the extent the rights herein given may be restricted by said ordinance authorizing issuance of the bonds or by the trust indenture, may either at law or in equity, by suit, action, mandamus or other proceeding protect and enforce any and all rights granted hereunder or under such ordinance or trust indenture, and may enforce and compel performance of all duties required by this act or by such

ordinance or trust indenture to be performed by the city or town issuing the bonds or by the Sewer Committee or any officer, including the making and collecting of reasonable and sufficient charges and rates for service rendered by the works . . .

19-4120. The authority herein given shall be in addition to, and not in derogation of, any power existing in any city or town under any statutory or charter provisions which it may now have or hereafter adopt. For all purposes of this act, all cities and towns shall have jurisdiction for ten miles outside the corporate limits thereof.

• • •

4. Agreement between United States Department of Interior and City of Hot Springs (terms agreed upon in 1933 and document signed March 25, 1935).

(T. 39; R. 38)

AGREEMENT

The following agreement is entered into between The City of Hot Springs, Arkansas through and by its Mayor Leo P. McLaughlin and the National Park Service, Department of the Interior through and by Thomas J. Allen, Jr., Superintendent Hot Springs National Park., Ark., in connection with participation of the Government through Hot Springs National Park, National Park Service Department of the Interior in the expense of constructing a city sewer system and sewage plant at Hot Springs, Ark.

1. The National Park Service will recommend to the Secretary of the Interior that 27½ percent of the cost of construction of a sewage disposal system for Hot Springs, Arkansas, be borne by the Government to cover usage of the system by the Government sources in Hot Springs National Park; Providing:

1. That the Government be not charged for any service or use of the system at any time in the future.

2. That the cost of all repairs, alterations, maintenance and operation of the system be borne by other than the United States Government sources.

3. That the plans and specifications for the system be drawn up by a firm of consulting engineers conversant with the sewage disposal plants and considered capable by representatives of the Interior Department; and that said plans and specifications meet with the approval of the State Health Department and the U. S. Public Health Service.

4. That representatives of the Interior Department shall have the right to enter and inspect the operation of the plant at any time and to request betterment of the maintenance and operation of the City of Hot Springs authorities when such betterment is considered necessary. Should the representatives of the Interior Department and the City of Hot Springs not agree as to need of such betterment the question then to be considered by a board of arbitration consisting of a representative of the Interior Department, a representative of the City of Hot Springs, a representative of the State Health Department, a representative of the sanitation division of the U. S. Public Health Service, and a representative of the Hot Springs Chamber of Commerce.

5. Necessary replacements of the entire plant due to natural or human destruction not to be considered a part of paragraph "2."

6. The Government shall pay to the City of Hot Springs the sum represented as 27½% of the total cost of the project, or $82,000.00, whichever is less, as the Government's full share of the construction, engineering and any relative or contingent expense of the City of Hot Springs for the complete provision and installation of the sewerage system approved as Public Works Project Docket No. 3715. Partial payment of the said sum shall be made to the City of Hot Springs by the Government as the work progresses, at the end of each calendar month or as soon thereafter as practical on estimates made by the City of Hot Springs during the month covered by said estimate for the provision and installation of each feature of the sewerage system, and the Government's share of such ex-

penditure shall be not more than 27½% of the accumulated cost at the time payment is made by the Government.

2. Now in token of this agreement as set forth above being equitable and satisfactory each to each, we hereunto set our respective hands and seals—

CITY OF HOT SPRINGS, ARKANSAS
HOT SPRINGS NATIONAL PARK,
National Park Service,
Department of the Interior.

5. Cession to United States by Arkansas. Act of Arkansas of Feb. 21, 1903, Act 30. (Vol. 2 Arkansas Statutes 1947 Annotated, Official Ed., Section 10-1123).

. . . That exclusive jurisdiction over that part of the Hot Springs reservation known and described as part of the Hot Springs Mountain, and whose limits are particularly described by the following boundary lines: Commencing at stone monument number seven set upon the west line of Reserve avenue and marking the boundary line of Hot Springs Mountain, and running thence in a northwesterly direction to a point upon the south line of Fountain Street to a stone monument numbered forty-two and marking the boundary line of Hot Springs Mountain, thence along the south line of Fountain Street to its intersection with Central avenue or to stone monument number thirty-three, thence south along the east line of Central avenue to where the same is intersected by Reserve avenue at stone monument number thirty, thence along the north boundary line of Reserve avenue to stone monument number seven, the point of commencement, all in township two south, range nineteen west, in the county of Garland, State of Arkansas, being a part of the permanent United States Hot Springs Reservation, is hereby ceded and granted to the United States of America to be exercised so long as the same shall remain the property of the United States; . . .

6. Acceptance of cession and exclusive jurisdiction by United States. Act of Congress, April 20, 1904, c. 1400, 33 Stat. at L. 187 (16 USC § 372).

That the portion of the Hot Springs Mountain Reservation in the State of Arkansas situated and lying within boundaries defined as follows, "commencing at stone monument numbered seven, set upon the west line of Reserve avenue and marking the boundary line of Hot Springs Mountain, and running thence in a northwesterly direction to a point upon the south line of Fountain Street to a stone monument numbered forty-two and marking the boundary line of Hot Springs Mountain, thence along the south line of Fountain Street to its intersection with Central avenue or to stone monument numbered thirty-three; thence south along the east line of Central avenue to where the same is intersected by Reserve avenue at stone monument numbered thirty; thence along the north boundary line of Reserve avenue to stone monument numbered seven, the point of commencement; all in township two south, range nineteen west, in the county of Garland, and State of Arkansas, being a part of the permanent United States Hot Springs Reservation," sole and exclusive jurisdiction over which was ceded to the United States by an act of the general assembly of the State of Arkansas, entitled "An act ceding jurisdiction to the United States over a part of the Hot Springs Mountain Reservation," approved February twenty-first, nineteen hundred and three, which cession is hereby accepted, or within such boundaries as may be defined hereafter, shall be under the sole and exclusive jurisdiction of the United States, and all laws applicable to places under such sole and exclusive jurisdiction shall have full force and effect therein . . .

7. Act of Congress, Dec. 16, 1878, c. 5, 20 Stat. at L. 258, as amended, particularly by Act of April 12, 1904, c. 1249, 33 Stat. at L. 173 et seq. (16 USC § 361).

. . . And provided further, that the Secretary of the Interior be, and he is hereby authorized to grant to hotels having bath houses attached, and to bath houses situated on the Hot Springs reservation, as well as in the

city of Hot Springs, Arkansas, the right to install, maintain and use, either in said bath houses or in connection with the rooms of said hotels or the bath houses attached to said hotels, as many bath tubs as in his discretion he may deem proper and necessary for the public service and the amount of hot water will justify . . .; and the Hot Springs with the reservation and mountain are hereby dedicated to the United States, and shall remain forever free from sale or alienation.

8. Act of Congress, Mar. 3, 1891, c. 538, 26 Stat. at L. 842 et seq. (16 USC Sec. 362, 363).

. . . That the Secretary of the Interior is hereby authorized and empowered to execute leases to the bath-houses and bath house sites on the permanent reservation at Hot Springs, Arkansas, for periods not exceeding twenty years, and at an annual rental of not less than thirty dollars per tub for each tub used in any bath-house. Said annual rental shall be payable quarterly in advance, at the office of the Government Superintendent of said property, in Hot Springs, Arkansas: . . . Provided, that after the Army and Navy hospital bath-house, the public bath-house, the bath-houses which are now or may hereafter be authorized on the permanent reservation, the Arlington Hotel, and the bath-houses off the permanent reservation now authorized to be supplied with hot water, in the order herein named, if there shall still be a surplus of hot water the Secretary of the Interior may, in his discretion and under such regulations as he may prescribe, cause hot water to be furnished to bath-houses, hotels, and families off the permanent reservation: . . . Provided further, That the Secretary of the Interior shall at the expiration of each period of five years during the continuance of each lease made hereunder readjust the terms and amounts of payment provided for therein as may be just, but not less than the minimum herein provided. . .

Section 3. That all power now possessed by the Secretary of the Interior for the regulating of leases of bath-houses, bath-house privileges, or hotel rights on the reservation, or as to supplying hot water to places off the reservation, is hereby retained and continued in him; and

full power is vested in the Secretary of the Interior to provide, in all leases to be executed against any combination among lessees or their assigns, as to ownership, prices, or accommodations at any bath-house; full power is also vested in him to make all needful rules and regulations as to the use of the hot water, and to prevent its waste, including full power to authorize the superintendent of the reservation to make examination and inspection at any time of the manner of using the hot water at any bath-tub, that it may be used in proper quantity only, and to prevent its waste; and also full power to provide and fix reasonable maximum charges for all baths, or bathing privileges, or services of any person connected with any bath-house furnished to bathers; . . . and also, generally, the Secretary of the Interior may make all necessary rules or regulations as to said bath-houses and the service therein as shall be deemed best for the public interest, and to provide penalties for the violation of any regulation which may be enforced as though provided by Act of Congress. All leases and grants of hot-water privileges shall be held to be subject to all regulations now in force or which may be hereafter adopted by the Secretary of the Interior, and for any violation of any regulation, known to the proprietor at the time of the offense, the lease or grant may be canceled by the Secretary of the Interior. It shall be expressly provided in all leases and grants of privilege for hot water that the bath-house for which provision is made shall not be owned or controlled by any person, company, or corporation which may be the owner of or interested (as stockholder or otherwise) in any other bath-house on or near the Hot Springs Reservation; that neither the hot-water privilege granted nor any interest therein, nor the right to operate or control said bath-house, shall be assigned or transferred by the party of the second part without the approval of the Secretary of the Interior first obtained, in writing . . . All buildings to be erected on the reservation shall be on plans first approved by the Secretary of the Interior, and shall be required to be fire proof, as nearly as practicable . . .

9. Article 1, Section 8, Clause 17 of the Constitution of the United States.

The congress shall have power . . . to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;

10. Article 4, Section 3, clause 2, of the Constitution of the United States.

. . . The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;

11. Amendment 14, Section 1, to the Constitution of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

12. Article 1, Section 10, clause 1, of the Constitution of th United States.

No state shall . . . pass any . . . law impairing the obligation of contracts, . . .

13. Article 6, clause 2, of the Constitution of the United States.

. . . This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in

every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding . . .

FILE COPY

No. 791

SUPREME COURT OF THE UNITED STATES

October Term, 1958

LAMAR BATH HOUSE COMPANY, BUCKSTAFF BATH HOUSE COMPANY, OZARK BATH HOUSE COMPANY, QUAPAW BATH HOUSE COMPANY, MAURICE BATH COMPANY, SUPERIOR BATH HOUSE COMPANY, FORDYCE BATH HOUSE and HALE BATH HOUSE *Appellants*

v. No.

CITY OF HOT SPRINGS, ARKANSAS, HOT SPRINGS SEWER COMMITTEE, RAY S. SMITH, SR., THOMAS W. STONE, and C. T. BATES, MEMBERS OF THE HOT SPRINGS SEWER COMMITTEE, and ATTORNEY GENERAL OF THE STATE OF ARKANSAS *Appellees*

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

MOTION OF APPELLEES, CITY OF HOT SPRINGS, ARKANSAS, HOT SPRINGS SEWER COMMITTEE, and RAY S. SMITH, SR., THOMAS W. STONE and C. T. BATES, MEMBERS OF THE HOT SPRINGS SEWER COMMITTEE, TO DISMISS

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SUPREME COURT OF THE UNITED STATES

October Term, 1958

LAMAR BATH HOUSE COMPANY, BUCKSTAFF BATH HOUSE COMPANY, OZARK BATH HOUSE COMPANY, QUAPAW BATH HOUSE COMPANY, MAURICE BATH COMPANY, SUPERIOR BATH HOUSE COMPANY, FORDYCE BATH HOUSE and HALE BATH HOUSE ..... *Appellants*

v. No. ....

CITY OF HOT SPRINGS, ARKANSAS, HOT SPRINGS SEWER COMMITTEE, RAY S. SMITH, SR., THOMAS W. STONE, and C. T. BATES, MEMBERS OF THE HOT SPRINGS SEWER COMMITTEE, and ATTORNEY GENERAL OF THE STATE OF ARKANSAS ..... *Appellees*

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

MOTION OF APPELLEES, CITY OF HOT SPRINGS, ARKANSAS, HOT SPRINGS SEWER COMMITTEE, and RAY S. SMITH, SR., THOMAS W. STONE and C. T. BATES, MEMBERS OF THE HOT SPRINGS SEWER COMMITTEE, TO DISMISS

Appellees, City of Hot Springs, Arkansas, Hot Springs Sewer Committee, and Ray S. Smith, Sr., Thomas W. Stone, and C. T. Bates, members of the Hot Springs Sewer Committee, pursuant to Rule 16 of the Revised Rules

of this Court, move to dismiss the appeal in the above entitled case on the grounds that the appeal does not present a substantial federal question.

STATEMENT OF CASE

This case is an appeal from a final judgment and decision of the Supreme Court of the State of Arkansas,[1] affirming on direct appeal and reversing in part on cross appeal, a decree of the Chancery Court of Garland County, Arkansas,[2] holding that appellants must pay sewer service charges for their use of appellees sewer system.

The eight appellants, (one partnership, one individual, and six Arkansas Corporations) operate eight public bath houses located on land belonging to the United States as a part of the Hot Springs National Park located in Garland County, Arkansas. "Exclusice Jurisdiction" of the Park was ceded to the United States by the State of Arkansas in 1903, reserving to the State however, "the right to tax all structures and other property in private ownership on the Hot Springs Reservation—".[3] The United States, by act of Congress in 1904, accepted the cession and assumed "sole and exclusive" jurisdiction, subject to the reserved right of the State to tax structures and other property in private ownership.[4]

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1 ____ Ark. ____, 315 SW 2d 884. Entered June 16, 1958. Rehearing denied September 29, 1958. Not yet officially reported, but printed in The Law Reporter, Little Rock, Arkansas, Vol. 103 No. 23, p 875, June 16, 1958. Copy appears as appendix A-2, A-3 and appendix A-3, pp A-6—A-13 of appellants' statement as to jurisdiction.

2 Entered May 21, 1957. Copy appears as appendix A-1, pp A-1—A-4 of appellants' statement as to jurisdiction.

3 Act of Arkansas February 21, 1903, Act 30, 2 Ark. Stat. 1947, annotated, Sec. 10-1123. This act appears as appendix B-5, p A-28 of Appellants' Statement of Jurisdiction. The Statement as to jurisdiction does not print the act in its entirety, and omits the reservation by the State of Arkansas of power to tax structures and other property in private ownership.

4 Act April 20, 1904, 33 Stat. 187, 16 U. S. C., Sec. 372. This act appears as appendix B-6, pa.-29, of Appellants' Statement as to Jurisdiction, but the confirmation of the State's right of taxation is omitted by Appellants.

The bath houses operated by appellants are all situated on the east side of Central Avenue, the principal street of Hot Springs, Arkansas, facing a part of the business district of the City on the west side of Central Avenue. The city limit is the east side of Central Avenue directly in front of appellants' bath houses.[5]

The appellants operate these bath houses under 20-year leases from the United States Department of the Interior. There are two types of leases. The older lease form, under which appellants Ozark, Quapaw, Superior and Hale operate, recognize the ownership by the lessees of the buildings and fixtures, and provide for reimbursement to the lessee for the value of improvements upon expiration of the lease, if the premises are leased to another lessee. (See Ozark Bath House Company Lease, Sec. 2, p 1, Sec. 4, p 2, and Sec. 12, p 5, Stip. Ex. 2.) The newer lease form, under which appellants Buckstaff, Fordyce, Lamar and Maurice operate, recognizes that the lessees have a "possessory interest" in all of lessee's improvements on the leased premises, for which lessee will be compensated at the termination of the lease. (See Buckstaff Bath House Lease, Sec. 5 (a) & (b), p 4 and Sec. 11 (a) and (b), pp 7 and 8, Stip. Ex. 1.)

Appellants assert that it is the policy, responsibility and obligation of the Federal Government, through the National Park Service to provide for sewage disposal for the entire Park, including appellants' sewage. Neither of the two forms of lease mentions any obligation of the government in connection with sewage disposal. On the contrary, the older form specifically provides that: "The operator shall also provide and maintain, at its own expense, ample and safe sewage and drainage, with all necessary appliances, conducted on the best principle to

[5] Stipulation, Exhibit 5, Map of Hot Springs National Park. Appellants' bath houses are shown on this map as numbers 25, 13, 16, 12, 22, 19, 10 and 14.

secure sanitary conditions, and particularly to protect from contamination all springs situated on said site, and keep the same in such condition, to the satisfaction of the superintendent." (Stip. Ex. 2, Sec. 6, p 3.) The newer lease form does not mention sewage disposal.

All eight of the appellants secure their water for ordinary purposes, other than therapeutic baths, from the Hot Springs Municipal Water System and pay the prescribed charges for such water service. In addition to the city water used by appellants, they use large quantities of hot mineral water procured from the Hot Springs located on the Park to provide therapeutic bath treatments for their customers.

(See Schedule of Water used by bath houses, Stip. Ex. 10.) Water rates based on 25c per thousand gallons for all hot mineral water used are paid by appellants to the Secretary of the Interior under provisions of their leases. (See Stip. Ex. 1, Sec. 8 (2), p 5 and Stip. Ex. 2, Sec. 3 (b), 1st Amendment, p 2.)

All city water used by appellants for sanitary purposes and all hot mineral water used by them is discharged into the sewer system of the City of Hot Springs and is processed in a sewage disposal plant operated by the City. The volume of city water discharged into the city sewers by appellants in 1952 was 4,452,800 gallons and in 1953 was 4,971,100 gallons. The volume of hot mineral water discharged by appellants into the city sewer system for the year 1952 was 52,912,700 gallons and for the year 1953 was 50,834,700 gallons (Stip. Ex. 10.) For each of these two years, appellants use of the city sewers amounted to approximately 7.5% of the total annual city sewage flow. (Opinion of Supreme Court of Arkansas, appendix A-3, Statement of Jurisdiction, p A-7.)

The sewer service charges, which the Supreme Court of Arkansas has required appellants to pay, are based upon appellants' use of the city Sewer System as above set out.

Prior to the year 1935, the City had no sewage disposal plant. Sewage from the National Park, including appellants' sewage, was emptied into a main constructed by the Department of the Interior which carried the sewage beyond the park boundaries and emptied into a creek running through a portion of the City. City sewer mains also emptied into this creek, which flows into Lake Hamilton, a lake formed by a dam across the Ouachita River about 5 miles from the city.

In 1934, after negotiations in 1933, the City of Hot Springs, entered into an agreement with the National Park Service, Department of the Interior, relative to construction of a sewage disposal plant. Recognizing that the Hot Springs Reservation, including appellant bath houses located thereon, contributed a large percentage of the city's sewage, the Park Service agreed to pay 22% of the construction cost as its share of such cost and an additional 5% of the construction cost in lieu of maintenance and operation charges. The aggregate amount contributed by the Park Service was $82,000.00. Appellants furnished no part of the consideration.

In consideration of this contribution, the city made the following agreements:

1. That the Government be not charged for any service or use of the system at any time in the future.
2. That the cost of all repairs, alterations, maintenance and operation of the system be borne by other than the United States government sources.

3. Necessary replacements of the entire plant due to natural or human destruction not to be considered a part of paragraph '2'.

The balance of the cost of construction of the sewage collection and disposal system was paid partly by the U. S. Public Works Administration, and partly by City Bond Issue of $175,000.00 financed by a 1.5-mill ad valorem tax on all taxable property in the city.

In 1934 the County Clerk extended the 1.5-mill tax against the property of appellants assessed for taxation. In July, 1935, the appellants in this case filed an action in the Garland Chancery Court to restrain collection of the bond millage, setting up the contract as a defense. A temporary restaining order issued, and the matter lay dormant until 1945 when the city filed a motion to dissolve the injunction and for judgment for past due taxes. After a full trial, including taking of testimony, the Chancery Court held that the appellants were "United States Government Sources", within the meaning of the agreement with the city, and enjoined the assessment against the collection of the 1.5-mill tax from appellants. The city did not appeal.

By 1952, it became apparent that the city sewage disposal plants were obsolescent, inadequate and heavily overloaded, thus creating a serious pollution problem in Lakes Hamilton and Catherine. A thorough engineering study was made, resulting in recommendations to enlarge, overhaul and reconstruct the disposal plants and to change entirely the method of purifying the city's sewage. To accomplish this improvement, a bond issue in the amount of $786,000.00 was authorized, to be financed by a sewer service charge under the provisions of Act 132 of 1933 (Sec. 19-4101 et seq., Ark. Stat. 1947). Prior to that time, the city had never levied any sewer service charge.

The sewer service charge rates were set out in Ordinance No. 24446.[6] After the completion of the work, bills for sewer service charges were sent to users of the system, including appellants. Charges to appellants were calculated upon the total volume of sewage discharged by them into the city sewer system, including both city water and hot mineral water furnished by the National Park Service.

Appellants refused to pay the sewer service charges, and in the summer of 1955 filed an action to enjoin collection of the charges relying on the 1934 contract with the city, *res adjudicata* in the previous action, and estoppel, and asserting that the application of the sewer service charges to them was in violation of the exclusive jurisdiction of the Federal Government over the Park denied them due process of law and equal protection of the laws, and unconstitutionally impaired the obligation of the 1935 contract. Appellees pleaded that the contract was *ultra vires* as applied to the sewer service charges and cross complained for judgment for the full amount of the unpaid sewer service charges plus statutory penalties and attorney's fees.

The trial court held that the 1934 contract was *ultra vires* as applied to the present sewer service charges and that appellants were liable for the charges calculated only on the volume of city water discharged into the sewers and disallowed charges calculated on the volume of hot mineral water discharged into the city sewers, and penalties and attorney's fees.

The Supreme Court of Arkansas affirmed on direct appeal, holding the 1935 contract *ultra vires* as applied to the present city sewer charges, and denying appellants other grounds for relief, and reversed the trial court in part on cross appeal, holding that appellants were liable

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[6] City of Hot Springs Ordinance No. 2444, adopted August 17, 1953, appendix B-1 pp A-16—A-18 Appellants' Statement as to Jurisdiction.

for sewer service charges based upon all sewage discharged into the city system, including hot mineral water discharged into the system by appellants.

THE FEDERAL QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

Briefly stated, the questions presented by appellants are:

1. Application of city sewer charges to appellants violated (a) the exclusive and paramount federal authority and jurisdiction over the park under Article 1, Sec. 8, Clause 17, and Article 4, Sec. 3, Clause 2 of the United States Constitution, and (b) Federal immunity as to property and functions under the Constitution.

2. (a) Imposition of the charges on appellants as a personal liability violates the due process clause of Section 1 of the 14th amendment to the Constitution of the United States, and (b) imposition of the charges outside the jurisdiction of the city and within that of another government violates due process.

3. Appellants have been denied equal protection of law in that sewer service charges have been imposed upon them and not upon the National Park Service and the United States.

4. Imposition of sewer service charges on appellants unlawfully impairs the obligation of the 1935 contract between the Department of the Interior and the city of Hot Springs, in violation of Article 1, Sec. 10, Clause 1, of the Constitution of the United States.

None of the questions presented are substantial.

I

Imposition of sewer service charges on appellants does not violate federal authority, jurisdiction or immunity over the park area.

Even if the sewer service charge were a tax levy, it could be applied to appellants by authority of the State's reserved right to tax "structures and other property in private ownership on the Hot Springs Reservation".[7] But the sewer service charge is not a tax. It is a rate or charge for the privilege of using the sewer system, and all those, whether within or without the territorial limits of the city, who use the sewers, must pay for this service. Vacant property is exempt from the charge because no use is made of the sewers.[8]

The Supreme Court of Arkansas has passed upon this express question and has held that the sewer service charge is not a tax or assessment, but is a proper sewer service charge, in a case in which a city had contracted with a Housing Authority, not to levy taxes and assessments upon a housing project, acting under a statute permitting such contracts.[9]

Since appellants' places of business are located outside the city limits, they cannot be compelled to connect their properties to and use the city sewer system. If they desire to use the sewers, they must pay the legally established rates for sewer service. Appellants, on their theory, could equally well argue that they could use and refuse to pay for water provided by the Hot Springs Municipal Water System, or, if the city had a municipally owned light

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[7] Act of Ark. Feb. 21, 1903, Act 30, 2 Ark. Stat. annotated, Sec. 10-1123; Act Apr. 20, 1904, 33 Stat. 187, 16 U.S.C., Sec. 372.

[8] Act of Ark., March 21, 1933. Act 132 of 1933, Sec. 13, Vol. 2B, Ark. Stat. 1947 annotated, Sec. 19-4113. See appendix B-3, pp A-23, A-24, Statement as to Jurisdiction.

[9] *Housing authority of City of Blytheville* v. *City of Blytheville*, ___ Ark. ___, 310 S.W. 2d 222, 223, opinion delivered 2-24-58.

and power system, use electricity without paying for it, because they are located on Federal property, outside the municipal boundaries.

The decisions of this Court and other Courts cited by appellants in support of this theory have no application. These cases deal with taxation,[10] milk control measures,[11] civil penalties for default in delivery of telegram,[12] criminal offenses,[13] application of a state statute limiting hotel keepers liability,[14] construction of dams and generating facilities on public lands without permission,[15] application of state game laws,[16] obstruction of passage over public lands,[17] and application of state laws licensing massage operators.[18] Appellants have cited no decision holding that private businesses operating on federally owned territory are exempt from the payment of proper charges for their use of municipally owned utility systems because imposition of such charges violates Federal exclusive authority, jurisdiction, and immunity.

This case presents no substantial Federal Question as to Federal Authority, Jurisdiction or Immunity.

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10 *Fort Leavenworth Railroad Company* v. *Lowe*, 114 U.S. 525; *Surplus Trading Company* v. *Cook*, 281 U.S. 647; *United States* v. *County of Allegheny*, 322 U.S. 174; *Buckstaff Bath House Company* v. *McKinley*, 308 U.S. 358; *McCulloch* v. *Maryland*, 4 Wheat (U.S.) 316; *Van Brocklin* v. *Tennessee*, 117 U.S. 151; *Kern-Limerick* v. *Scurlock*, 347 U.S. 110.

11 *Pacific Coast Dairy, Inc.* v. *Department of Agriculture of California*, 318 U.S. 285.

12 *Western Union Telegraph Co.* v. *Chiles*, 214 U.S. 274.

13 *Bruson* v. *United States*, 146 U.S. 525.

14 *Arlington Hotel Company* v. *Fant*, 278 U.S. 439; *Williams* v. *Arlington Hotel Company* (CCA 8th), 22 F. (2d) 669.

15 *Utah Power & Light Company* v. *United States*, 243 U.S. 389.

16 *Hunt* v. *United States*, 278 U.S. 96.

17 *McElroy* v. *United States*, 260 U.S. 353.

18 *Ludwig* v. *Nancy*, 223 Ark. 559.

II

Imposition of sewer service charges on appellants as a personal liability, and imposition of such charges outside the city's territorial limits does not deprive appellants of due process of law.

Appellants' argument on this point is based upon their interpretation of the Arkansas Statute authorizing the city to levy sewer service charges on persons using the sewers.[19] In essence, the contention is that sewer service charges, under this statute, are imposed only upon the landowner whose premises are connected to the sewer system, and not upon the tenant or other person who actually uses the system. Consequently, under appellants' peculiar circumstances, as tenants of the United States, imposition of these charges upon them, rather than the landowner, as personal liabilities is a denial of due process of law.

The act and the ordinances state: "It is the intention of this act that a landowner shall be liable for such service charge even though the use of the sewer system is by his tenant or lessee; . . ." and ". . . said charges to constitute a lien upon the fee title to the land and permanent improvements even though the occupant receiving the benefit of the service for which the rate or charge is due has merely a leasehold interest (or other lesser state) in the premises."

Even without court interpretation, it seems clear that the intent of the statute is to impose the burden of the sewer service charge upon the person using the service, whether owner, occupant or lessee. The legislature recognized, however, that tenants and lessees might be less responsible than landowners, and, as an ultimate security,

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[19] Act of Ark. March 21, 1933, Act 132 of 1933, Sec. 13, Vol. 2-B, Ark. Stat. 1947 annotated, Sec. 19-4113. See appendix B-3, pp A-23, A-24, Appellants' Statement as to Jurisdiction.

made the land finally responsible for the charge. The only proper interpretation of section 41-4113 and the ordinances enacted under its authority, is that the charge is levied against the user, and, if he will not pay or cannot be collected from, then the land itself serves as security.

The Supreme Court of Arkansas, in *Jernigan* v. *Harris*, 184 Ark. 705, a case testing the constitutionality of this sewer act, rendered in 1933 immediately after its enactment, has decided this issue adversely to appellants' position. The court there held that the act "providing for the sale of the fee for a service charge due by an occupant in possession under a lesser estate is not subject to the objection that one owner is required to discharge a burden which the law has imposed upon another".

The same question was argued extensively by the appellants in the instant case in the Supreme Court of Arkansas. While the Arkansas Court's opinion (appendix A-3, pp A-6—A-13, Statement as to Jurisdiction) does not mention this problem, the Arkansas Court must necessarily have decided that the sewer service charges could be imposed *in personam*, against the tenant using the sewer. Otherwise, the decree of the Arkansas Court rendering judgment against appellants would not have been entered.

The question of whether or not a state statute providing for sewer service charges provides for collection of such charges from a tenant or lessee as well as the owner of the premises is solely a matter of state law, to be determined by the Supreme Court of the State.[20] As long as these charges may be collected from all tenants under the terms of the statutes involved, there can be no violations of appellants' right to due process of law in collecting

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[20] See *Hebert* v. *Louisiana*, 272 U.S. 312, 71 L. Ed. 270, 47 S. Ct. 103.

the sewer service charges from them as tenants, and users of the sewer system.

The decisions of the Supreme Court of Arkansas in *Jernigan* v. *Harris*, *supra*, and in this case, necessarily apply to all tenants and lessees, not merely to the appellants here, and no substantial federal question as to due process of law is presented.

Appellants further argue that imposition of sewer service charges on users located outside the city and within the jurisdiction of another government deprives them of due process of law. As more fully set out in the discussion of Point No. 1, these charges are a utility charge for services rendered by the city and are applicable to all users of the system, whether within or without the limits of the system. Again, no substantial federal question is presented.

III

Imposition of Sewer Service Charges upon Appellants Does Not Deny Them Equal Protection of the Law

Appellants complain that they have been denied equal protection of law because they have been billed for sewer service charges by the city and the Sewer Committee, while other occupants of the Park, i.e. the Army & Navy General Hospital, the National Park Service Offices, the Government Free Bath House, the comfort stations in the Park, and the residences of the Park Superintendent and Assistant Superintendent (T.59-60, R.59) have not been billed for such sewer service charges.

The three decisions of this Court cited by appellants in support of their claim of denial of due process,[21] all

[21] *Morey* v. *Doud*, 354 U.S. 457; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389; *Hartford Steam Boiler Inspection & Insurance Co.* v. *Harrison*, 301 U.S. 459.

deal with classifications within a statute itself which the Court held discriminatory and unjustified.

The state statute and the City Ordinances, by their terms apply to all users of the sewer system and contain no discriminatory classifications whatsoever. (See appendix B-1, B-2 and B-3, pp A-16—A-26, Appellants' Statement as to Jurisdiction.) No claims of denial of equal protection of law can be based upon the statute or ordinances.

The claim of denial of equal protection therefore, arises from the administrative action of the Sewer Committee in billing the appellants and not other occupants of the Park. No showing is made by appellants that the Sewer Committee has failed to charge any other users for use of the sewers except direct federally owned instrumentalities of the United States located on the Park. This is a purely administrative action of the Sewer Committee, not authorized by the Statute or the Ordinances, which falls far short of denial of equal protection to appellants.

This Court has held in *Mackay Telegraph & Cable Co.* v. *Little Rock*, 250 U.S. 94, 63 L. Ed. 863, 869, 39 S. Ct. 428,

> "Nor is there ground for holding that plaintiff in error is subjected to unreasonable discrimination, in contravention of the equal protection clause of the 14th Amendment. The case shows that its franchise ordinance imposes the same and no greater tax than that which is applied by a general ordinance to other companies maintaining poles in the city. The offer of testimony to prove that the two other companies were not in fact required to pay the tax upon so many of their poles as stood upon railroad rights of way went no further than to show that the general ordinance had not been enforced against them in the same manner that it

was proposed to enforce the franchise ordinance against plaintiff in error. There was no offer to show an arbitrary and intentionally unfair discrimination in the administration of the ordinance, as in *Yick Wo* v. *Hopkins*, 118 U.S. 356, 374, 30 L. ed. 220, 227, 6 Sup. Ct. Rep. 1064. Peradventure the present action was a test case to determine whether the license fees were applicable to poles standing elsewhere than on the streets, with the intent, in case of an affirmative answer, to enforce the general ordinance against *the other* companies in the same sense. Nor was there any offer to show that the circumstances of the several companies and their telegraph lines were so much alike as to render any discrimination in the application of the pole tax equivalent to a denial of the equal protection of the laws."

As a matter of fact, the suggestion in the Mackay case, *supra*, that it might be a test case, fits this case. The Sewer Committee decided that it would take on the bath houses before it challenged the United States Government.

If appellants felt themselves aggrieved because they were charged for using the city's sewers and other occupants of the Park were not, a complete and adequate remedy was open to them in the Arkansas courts by way of a mandamas action to compel the Committee to charge the others. This remedy was not pursued.

No substantial Federal Question of Equal Protection of the Law is presented.

IV

The Obligation of the 1935 Contract Is Not Impaired

The 1935 contract between the Department of the Interior and the City of Hot Springs, upon which appel-

lants rely, provides for the payment by the United States of 27½% of the cost of the original sewage disposal system or the sum of $82,000.00, whichever was less, providing:

> "1. That the Government be not charged for any service or use of the system at any time in the future.
>
> 2. That the cost of all repairs, alterations and maintenance of the system be borne by other than United States Government sources."[23]

On the face of the agreement, it could be argued that appellants, as private businesses operating on the Park, are not "United States Government sources" within the meaning of the paragraph No. 2 of the proviso. This question is precluded by the decree of the Chancery Court of Garland County, Arkansas, rendered October 23, 1945, and not appealed, enjoining the collection of the 1.5-mill tax levied to pay the bonds issued for the 1935 sewage disposal system.[24] But this Chancery Court decision applied only to the 1.5-mill ad valorem tax, and had no possible application to sewer service charges not then levied, to pay for sewage disposal reconstruction not then in contemplation.

Even if it is conceded that appellants are United States Government sources under the terms of the 1935 contract, although they paid no part of the consideration, the contract could and did exempt appellants only from the 1.5-mill ad valorem tax for the original disposal system, and they can not claim any exemption from sewer service charges levied to pay for and maintain a new sewage disposal system required as a result of obsolescence and inadequacy of the original system.

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23 Agreement between United States Department of Interior and City of Hot Springs, March 25, 1935. See appendix B-4, pp A-26—A-38, Appellants' Statement as to Jurisdiction.

24 Stip. Exhibit 11, pp 53-54.

The Supreme Court of Arkansas, in its decision in this case, held that the contract was *ultra vires* . . ." ". . . in so far as it would estop or deny the City of Hot Springs the right and power, now or at any future time, in the exercise of its police powers to enforce collection of sewer charges against appellants".[25]

In support of its decision, the Arkansas Court cited the following language from *Risser* v. *City of Little Rock*, 225 Ark. 318, 281 S.W. 2d 949, Certiorari denied, 350 U.S. 965, 76 S. Ct. 433, 100 L. ed. 838, a case concerning a contract by the City for the permanent location of a city street:

> "A municipality cannot bind itself by a perpetual contract, or by one which lasts an unreasonable length of time. . . It is declared to be against public policy to permit a municipal corporation to part with any of its legislative power. In the absence of a clear grant of power from the legislature, the municipal authorities can do nothing which amounts in effect to the alienation of a substantial right of the public. It cannot obligate itself not to exercise such powers, and a contract in which it purports to do so, even upon valuable consideration, is void. Thus, a municipal corporation cannot, by contract or otherwise, divest itself of its general police power, or of the power of eminent domain which has been delegated to it by the legislature, or of the power of taxation."

The proposition that a city cannot permanently bargain away its governmental functions is not new to Arkansas Law. See *North Little Rock Water Co.* v. *Water Works Commission of Little Rock*, 199 Ark. 773, 136 S.W. 2d 194; *Delany* v. *Rucker*, 227 Ark. 869, 302 S.W. 2d 287.

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[25] Opinion, June 16, 1958—appendix A-3, p A-8, Appellants' Statement as to Jurisdiction.

The contract between the City and Federal Government mentioned in *Atkinson* v. *Pine Bluff*, 190 Ark. 65, 76 S.W. 2d 982, cited by appellants, involved a Federal contribution to a sewer system with the requirement that certain specified works must be constructed. It did not include any permanent, or even temporary, abrogation of the city's governmental powers, and the case has no application here.

In *Johnson* v. *Russell, Mayor*, 198 Ark. 49, 127 S.W. 2d 260, also cited by appellants, the Arkansas Court held that the city was specifically authorized to contract for Public Works Administration assistance by Act 132 of 1933, the very act whose application appellants now resist. No question of contracting away governmental powers was present and the case is not in point here.

In addition to its own prior decisions, the Arkansas Supreme Court in this case relied upon substantially similar decisions from other states, particularly *State ex rel Gordon* v. *Taylor*, 149 Ohio St. 427, 79 N.E. 2d 127, which held a contract between a city and the State University for perpetual exemption from sewer service charges in consideration of the grant of an easement across University property *ultra vires* and invalid.

If the contract was *ultra vires* and the City had no power to contract away in perpetuity its right to impose charges for the use of its sewers, as the Supreme Court of Arkansas has decided, basing its decision on well established Arkansas law, appellants' plea of impairment of the obligation of the contract is baseless. There can be no impairment of an invalid, *ultra vires* contract. See *Buffalo & Jamestown Railroad Co.* v. *Falconer*, 103 U.S. 821, 26 L. ed. 471; *Louisiana Western R. Co.* v. *City of Crowley*, 142 La. 640, 77 So. 486, error dismissed 249 U.S. 593, 39 S. Ct. 391, 63 L. ed. 793.

It is conceded, as appellants state, that the Supreme Court of the United States

> ". . . has always jealously asserted the right, when the question before it was the impairing of the obligation of a contract by state legislation, to ascertain for itself whether there was a contract to be impaired. If it were not so, the constitutional provision could always be evaded by the state courts giving such construction to the contract, or such decisions concerning its validity, as to render the power of this court of no avail in upholding it against unconstitutional state legislation." *Delmas* v. *Merchants Mutual Insurance Company*, 81 U.S. 661, 20 L. ed. 757.

But this Court has also said:

> ". . . we lean toward agreement with the courts of the state, and accept their judgment as to such matters (impairment of obligation of contracts) unless manifestly wrong." See *Hale* v. *Iowa State Board of Assessment and Review*, 302 U.S. 95, 101, 82 L. ed. 73, 76, and cases cited therein.

We submit that the decision of the Arkansas Supreme Court in this case, based as it is on prior Arkansas cases, far from being manifestly wrong, is manifestly right. No substantial Federal Question of impairment of the obligation of a contract is presented.

We respectfully submit therefore, that the appellants present no substantial Federal questions for the decision of this Court and that the appeals should be dismissed.

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